Supreme Court, U.S.
FILED
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No. 02-1624

In The

SUPREME COURT OF THE UNITED STATES
October Term, 2003

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,

vs.

MICHAEL A. NEWDOW,
Respondent,

On Writ of Certiorari from the United States
of Appeals for the Ninth Circuit

JOINT APPENDIX

Terence J. Cassidy
Michael W. Pott
Porter, Scott, Weiberg & Delehant
350 University Avenue, #200
Sacramento, CA 95825
(916) 929-1481
Counsel for Petitioners

Michael A. Newdow
First Amendmist Church
of True Science
P.O. Box 233345
Sacramento, CA 95823
(916) 427-6669
Counsel for Respondent

Theodore B. Olson
Department of Justice, Office of the Solicitor General
950 Pennsylvania Ave, NW, Room 5615
Washington, DC 20530-0001
Counsel for the United States

Petition for Certiorari Filed April 30, 2003
Certiorari Granted October 14, 2003

TABLE OF CONTENTS

Table of Contents i

Relevant docket entries from the United States District Court for the Eastern District of California 1

Relevant docket entries from the United States Court of Appeals for the Ninth Circuit 7

Plaintiff's Original Complaint 24

Population Chart 72

All Americans Pie Chart 73

All Theists Pie Chart 74

All Protestants Pie Chart 75

All Christians Pie Chart 76

All Baptists Pie Chart 77

The Findings and recommendations of the United States District Court for the Eastern District of California Dismissing the complaint of Respondent filed July 21, 2000, reported at *Newdow v. Congress of the United States*, 2000 U.S. Dist. LEXIS 22366 78

Declaration of Sandra Banning in Support of Motion for Leave to Intervene, or Alternatively, to Dismiss the Complaint filed August 5, 2002 81

Reporter's Partial Transcript of Proceedings of September 11, 2002 in Banning v. Newdow 89

Supplemental Declaration of Sandra Banning in Reply to Plaintiff-Appellant's Opposition to Motion for Leave to Intervene , or Alternatively, to Dismiss the Complaint 132

The Opinion of the United States Court of Appeals for the Ninth Circuit Denying the Motion for Leave to Intervene brought by the mother of Respondent's minor child, filed December 4, 2002, reported at *Newdow v. United States Congress*, 313 F. 3d 500, (9th Cir. 2002) 138

Elk Grove Unified School District Board Policy 6115 149

U.S. District Court

EASTERN DISTRICT OF CALIFORNIA (Sacramento)
CIVIL DOCKET FOR CASE #: 00-CV-495

Newdow v. US Congress, et al
Filed: 03/08/00
Assigned to: Senior Judge Milton L Schwartz
Referred to: Magistrate Judge Peter A Nowinski
Demand: $0,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: US Defendant
Dkt# in other court: None
Cause: 42:1983 Civil Rights Act

MICHAEL A NEWDOW, Rev Dr
plaintiff

Michael A Newdow
[COR LD NTC] [PRO SE]
First Amendmist Church
of True Science
PO Box 233345
Sacramento, CA 95823
916-427-6669

v.

US CONGRESS
defendant

USA
defendant

WILLIAM JEFFERSON CLINTON,

President of the United States defendant	
- STATE OF CALIFORNIA defendant	Theodore Garelis [COR LD NTC] Attorney General's Office for the State of California PO Box 944255 1300 I Street Suite 125 Sacramento, CA 94244-2550 916-445-9555
ELK GROVE UNIFIED SCHOOL DISTRICT defendant	A Irving Scott [COR LD NTC] Porter Scott Weiberg and Delehant PO Box 255428 350 University Avenue Suite 200 Sacramento, CA 95865 916-929-1481
DAVID W GORDON, Superintendent EGUSD defendant	A Irving Scott (See above) [COR LD NTC]
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT defendant	A Irving Scott (See above) [COR LD NTC]
JIM SWEENEY, Dr., Superintendent SCUSD defendant	A Irving Scott (See above) [COR LD NTC]

3/8/00	1	COMPLAINT (Pro Se), fee status paid, receipt # 197186, assigned to Senior Judge Milton L. Schwartz referred to Magistrate Judge Peter A. Nowinski (ljr) [Entry date 03/09/00]
4/12/00	5	NOTICE OF MOTION AND MOTION to dismiss for failure to state a claim upon which relief can be granted by defendant or in the alternative for a more definitive statement motion TO BE HEARD by Senior Judge Milton L. Schwartz ; Motion Hearing Set For 5/19/00 at 9:00 am (ch1) [Entry date 04/13/00]
4/12/00	6	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion to dismiss for failure to state a claim upon which relief can be granted [5-1] (ch1) [Entry date 04/13/00]
4/13/00	7	AMENDED MOTION (terminating original motion #5) to dismiss for failure to state a claim upon which relief can be granted by dfts Elk Grove Unified, David Gordon, Sacramento City USD, Jim Sweeney, and/or in the alternative a motion for more definite statement by dfts Elk

		Grove Unified, David W Gordon, Sacramento City USD, Jim Sweeney Motion Hearing Set for 5/15/00 at 9:00 before PAN (ljr) [Entry date 04/14/00]
4/21/00	8	OPPOSING MEMORANDUM by plaintiff Michael A Newdow to motion to dismiss [7-1] (ljr) [Entry date 04/24/00]
4/26/00	11	MEMORANDUM (with signature) by plaintiff Michael A Newdow in opposition to motion to dismiss [8-1] (ljr) [Entry date 05/02/00]
5/4/00	12	REPLY by Elk Grove Unified, David W Gordon, Sacramento City Unified School District, and Jim Sweeney to response to motion to dismiss for failure to state a claim upon which releif [sic] can be granted by dfts Elk Grove Unified, David Gordon, Sacramento City USD, Jim Sweeney [7-1] (mm) [Entry date 05/05/00]
5/25/00	15	FINDINGS AND RECOMMENDATIONS by Magistrate Judge Peter A. Nowinski RECOMMENDING that plt's complaint be dismissed (cc: all counsel) (ndd) [Entry date 05/25/00]

5/31/00	16	OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [15-1] by plaintiff Michael A Newdow (ljr) [Entry date 06/01/00]
5/31/00	17	APPENDIX A by plaintiff Michael A Newdow regarding [16-1] (ljr) [Entry date 06/01/00]
6/6/00	18	RESPONSE by dfts Elk Grove Unified, David W Gordon, Jim Sweeney and Sacramento City USD to objections to MJ findings and recommendations [16-1] (mll) [Entry date 06/07/00]
6/20/00	19	Plt's Submission of Supplemental Authority in support of his Objections [16-1] (ndd) [Entry date 06/21/00]
7/21/00	21	ORDER by Senior Judge Milton L. Schwartz ORDERING findings & recommendations filed 5/25/00 are ADOPTED in full [15-1]; pltf's complaint is DISMISSED [1-1] CASE DISMISSED (cc: all counsel) (ljr) [Entry date 07/21/00]
7/26/00	23	NOTICE OF APPEAL by plaintiff Michael A Newdow from District Court decision re judgment ordering findings and recommendations filed 5/25/00, adopted in

full; pltf's complaint dismissed [22-1], per order of 7/21/00 [21-2](fee status paid) (dc) [Entry date 07/26/00] [Edit date 07/27/00]

8/24/00 27 TRANSCRIPT of 5/15/00 hearing on Settlement Conference and Dft's Motion to Dismiss by C/R ECRO (ds) [Entry date 08/25/00]

9/13/00 28 TRANSCRIPT of 5/15/00 at 9:00 hearing on settlement conference and dfts motion to dismiss; by C/R Vars (mll) [Entry date 09/14/00]

9/25/00 29 LETTER to court from Plaintiff Michael A. Newdow enclosed the listings and pie charts which was provided to the court on 5/15/00 (ndd) [Entry date 09/26/00]

11/12/02 34 TRANSCRIPT of 9/25/02 hearing on Motion re change of custody; request for atty's fee by C/R Electronic Recording Monitor Terrena V Smith (ak) [Entry date 11/12/02]

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 00-16423 Filed: 8/1/00
Nsuit: 2440 Other civil rights (USdf)
Newdow, et al v. US Congress, et al
Appeal from: Eastern District of California (Sacramento)

Case type information:
1) civil
2) US
3) (null)

Lower court information:
District: 0972-2 : CV-00-00495-MLS/PAN
presiding judge: Milton L. Schwartz, District Judge
Date Filed: 3/8/00
Date order/judgment: 7/21/00
Date NOA filed: 7/26/00

Fee status: paid

Prior cases:
None
Current cases:
None

00-16423 Newdow, et al. v. U.S. Congress, et al.

MICHAEL A. NEWDOW
Plaintiff - Appellant

Michael A. Newdow
916-427-6669
[COR LD NTC prs]
FIRST ADMENDMIST CHRUCH [sic] OF TRUE SCIENCE
P.O Box 233345
Sacramento, CA 95823

v.

UNITED STATES OF AMERICA
Defendant - Appellee

Terence John Cassidy
FAX 916/927-3706
916/929-1481
[COR LD NTC ret]
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue
Sacramento, CA 95825

Robert M. Loeb, Esq.
FAX 202/514-8151
202/514-4332
Room 9126
[COR LD NTC aus]
U.S. DEPARTMENT OF JUSTICE
Civil Division
601 "D" Street, N.W.
Washington, DC 20004-0001

Kristin S. Door, Esq.
916/554-2741
Suite 10-100
[COR LD NTC aus]
Paul L. Seave, Esq.
916/554-2741
[COR LD NTC aus]
UNITED STATES ATTORNEY'S OFFICE
501 I Street
Sacramento, CA 95814
No appearance
[COR LD]

WILLIAM JEFFERSON CLINTON,
President of the United States
Defendant - Appellee

Terence John Cassidy
(See above)
[COR LD NTC ret]

Robert M. Loeb, Esq.
(See above)
[COR LD NTC aus]

Kristin S. Door, Esq.
(See above)
[COR LD NTC aus]
Paul L. Seave, Esq.
(See above)
[COR LD NTC aus]

No appearance
(See above)
[COR LD]

STATE OF CALIFORNIA
Defendant - Appellee

Terence John Cassidy
(See above)
[COR LD NTC ret]

Robert M. Loeb, Esq.
(See above)
[COR LD NTC aus]

Frank S. Furtek
FAX (91 [sic]
(916) 327-1270
[COR LD NTC dag]
Theodore Garelis, Esq.
FAX 916/324-5916
916/445-0767
[COR LD NTC dag]
AGCA - OFFICE OF THE CALIFORNIA
ATTORNEY GENERAL (SAC)
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550

No appearance
(See above) [COR LD]

ELK GROVE UNIFIED SCHOOL DISTRICT
Defendant - Appellee

Terence John Cassidy
(See above)
[COR LD NTC ret]

A. Irving Scott, Esq.
916-929-1481
Suite 200
[COR LD NTC ret]
PORTER, SCOTT, WEIBERG AND DELEHANT
A Professional Corporation
350 University Avenue
Sacramento, CA 95825

Robert M. Loeb, Esq.
(See above)
[COR LD NTC aus]

DAVID W. GORDON,
Superintendent EGUSD
Defendant - Appellee

Terence John Cassidy
(See above)
[COR LD NTC ret]

A. Irving Scott, Esq.
(See above)
[COR LD NTC ret]

	Robert M. Loeb, Esq. (See above) [COR LD NTC aus]
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT Defendant - Appellee	Terence John Cassidy (See above) [COR LD NTC ret]
	A. Irving Scott, Esq. (See above) [COR LD NTC ret]
	Robert M. Loeb, Esq. (See above) [COR LD NTC aus]
JIM SWEENEY, Superintendent SCUSD Defendant - Appellee	Terence John Cassidy (See above) [COR LD NTC ret]
	A. Irving Scott, Esq. (See above) [COR LD NTC ret]
	Robert M. Loeb, Esq. (See above) [COR LD NTC aus]

MICHAEL A. NEWDOW

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; WILLIAM JEFFERSON CLINTON, President of the United States; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, Superintendent EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, Superintendent SCUSD

Defendants - Appellees

8/1/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF APPELLANT IN PRO PER AND COUNSEL FOR THE APPELLEES. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 8/7/00; appellee's designation of RT is due 8/15/00,, ; appellant shall order transcript by 8/25/00; court reporter shall file transcript in DC by 9/25/00; certificate of record shall be filed by 10/2/00; appellant's opening brief is due 11/13/00; appellees' brief is due 12/11/00; appellants' reply brief is due. [00-16423] (cha)

11/14/00	Filed original & 15 copies Appellant Michael A. Newdow opening brief (Informal: n) 62 pages & 5 Excs.; served on 11/10/00 [00-16423] (gva)
12/21/00	Filed original & 15 copies Aples' ans br of 17 pages; served on 12/20/00 [00-16423] (gva)
1/26/01	Received Michael A. Newdow additional citations, served on 1/24/01 (Records) [00-16423] (gva)
2/6/01	Filed original & 15 copies Aples Elk Grove USD, David W. Gordon, Sacramento City USD, Jim Sweeney's 11 pages brief; served on 2/5/01 [00-16423] (gva)
2/20/01	Filed original & 15 copies Michael A. Newdow reply brief, (Informal: n) 35 pages; served on 2/16/01 [00-16423] (gva)
3/2/01	FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD.(ORIGINAL) [00-16423] (sd)
2/25/02	Received notice of appearance of Robert M. Loeb and Lowell V. Sturgill as csls for federal aples; served on 2/22/02 (faxed to Panel) [00-16423] (gva)

2/25/02	Filed Aples' motion to address jurisdictional issues; served on 2/22/02 (faxed to Panel) [4372551] (gva)
3/5/02	Filed order (Deputy Clerk: MD) The aples' mtn to address jurisdictional issues is granted. (phoned: 9:00 am) [4372551-1] [00-16423] (gva)
3/7/02	Received Aty Lowell Sturgill for fed. defs's additional citations, pursuant to FRAP 28(j); served on 3/6/02 (faxed to Panel) [00-16423] (gva)
3/11/02	Filed Appellant Michael A. Newdow's motion to respond to federal defss' motion to address jurisdictional issues; served on 3/11/02 (hand deliver to Panel) [4382797] [00-16423] (gva)
3/14/02	ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ [00-16423] (gb)
4/2/02	Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ): Aplt's motion to respond to Federal Defs' motion to address jurisdictional issues is granted. (phoned:

2:00 pm) [4382797-1] [00-16423] (gva)

6/26/02 FILED OPINION: REVERSED AND REMANDED. Pltf is to recover costs. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Alfred T. GOODWIN, author; Stephen R. REINHARDT, concurring; Ferdinand F. FERNANDEZ, partial concurrence and partial dissent) FILED AND ENTERED JUDGMENT. [00-16423] (gva)

6/27/02 Filed order (Alfred T. GOODWIN): The judgment in this case filed 6/26/02 is stayed pending the resolution of any petition for rehearing, petition for rehearing en banc or sua sponte en banc consideration. The clerk is also directed to stay the mandate. [00-16423] (gva)

8/5/02 [4497962] Filed original & 50 copies Aples Jim Sweeney, Sacramento City USD, David W. Gordon, Elk Grove USD for panel rehearing and petition for rehearing en banc of pages [4,148 words] (Panel And All Active Judges) [00-16423] (gva)

8/5/02 Filed Sandra Banning's motion for leave to intervene, or alternatively, to dismiss the

complaint; declaration of Sandra Bannning in support; served on 7/31/02 (Panel And All Active Judges) [4498001] [00-16423] (gva)

8/12/02 [4503381] Filed original & 50 copies Aple USA petition for panel rehearing and petition for rehearing en banc of 18 pages [4,184 words]; served on 8/9/02 (Panel And All All Active Judges) [00-16423] (gva)

9/23/02 Received letter dated 9/18/02 from pro se re: ... hearing before Judge M. Mize of the California Superior Court of Sacramento was held yesterday, 9/17/02 as scheduled. No final decision was reached. There will be one more hearing on 9/25/02, at which time the matter of the State's court views of my rights to represent my daughter in the above mentioned case will hopefully be finally clarified. That should provide me with enough time to send my response to Ms. Banning's motion to intervene to you by the 27th. ... (Panel And All Active Judges) (gva)

9/27/02 Filed Appellant Michael A. Newdow response to Sandra Banning's motion for leave to interveneor [sic] or alternatively,

to dismiss the complaint; declaration of aplt; served on 9/27/02 (Panel & All Active Judges) [4498001-1] [00-16423] (gva)

10/7/02 Filed Sandra Banning's memorandum in reply to aplt's opposition to motion for leave to intervene, or alternatively, to dismiss the complaaint [sic]; supplemental declaration of Sandra Banning; served on 10/3/02 (Panel And All Active Judges) [4498001-1] [00-16423] (gva)

10/9/02 Filed order (GOODWIN, REINHARDT, FERNANDEZ) The United States of America and the Elk Grove school district are ordered to file supplemental brs, not to exceed 15 pages within 28 days from the date of this order: The supplemental briefs shall discuss the following: Whethr [sic] under CA state law the award of sole legal custody to one parent deprives the other of standing to object on constitutional grounds to the contents of school curricula, observances, and ceremonies affecting th child's educatin [sic] and reliqious [sic] upbringing. If the answer is yes, is the California rule constitutinal [sic]? [00-16423] (gva)

11/6/02 Filed original & 50 copies Aples Jim Sweeney, Sacramento City USD, David W. Gordon, Elk Grove USD,'s supplemental brief of 15 pages, [regarding standing and constitutionality]; served on 11/5/02 (Panel And All Active Judges) [00-16423] (gva)

11/7/02 Filed original & 50 copies Appellee USA's supplemental brief of 14 pages; served on 11/6/02 (Panel And All Active Judges) [00-16423] (gva)

11/7/02 Received Appellee USA's addendum to supplemental brief; served on 11/6/02 (Panel And All Active Judges) [00-16423] (gva)

11/7/02 Filed USA's motion to supplement the record on appeal; served on 11//6/02 (Pnael [sic] And All Active Judges) [4575644] (gva)

11/7/02 Filed Michael A. Newdow's additional citations, served on 11/6/02 (Panel And All Active Judges) [00-16423] (gva)

11/13/02 Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Ferdinand FERNANDEZ) The Government's motion to supplement the record on appeal is

granted. Teh [sic] addendum accompanying this motion is ordered filed. [00-16423] (gva)

11/13/02 Filed USA's Addendum to supplemental record on appeal; served on 11/6/02 [previously sent to Panel And All Active Judges] [00-16423] (gva)

12/3/02 Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ): The aplt is ordered to file a response to the petition for rehearing and petition for rehearing en banc filed by aples Elk Grove Unified School District and the United States of America within 21 days of the date of this order. The response shall not exceed 15 pages in length. [4582610-1] [00-16423] (gva)

12/4/02 Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ, concurring): ... Banning's motion for leave to intervene is DENIED because she has no protectable interest at stake in this action. [4498001-1] [00-16423] (gva)

12/18/02 Filed Appellant Michael A. Newdow's response to aples' petition for enbanc [sic]

rehearing of 16 pages [4,164 words]; served on 12/16/02 (Panel And All Active Judges) [00-16423] (gva)

2/28/03 Filed order and amended opinion (Judges Alfred T. GOODWIN, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ) (Orig. opinion id: [4466804-1]) The opinion filed 6/26/02, is ordered amended. The clerk is instructed to file the amended opinion with Judge Fernandez's amended concurrence/dissent. Judge Reinhardt's concurrence in the order denying rehearing en banc, along with Judge O'Scannlain's and Judge McKeown's dissent from that order shall also be filed. The clerk is also instructed not to accept for filing any new petitions for rehearing and petitions for rehearing en banc in this case. With the opinion thus amended, the panel has voted unanimously to deny the petition. The full court has been advised of the petitions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of an en banc consideration. FRAP 35. The petition for rehearing are denied and the petitions for rehearing en banc are denied. ...

	Plaintiff is to recovers costs on this appeal. REVERSED AND REMANDED. [4503381-1] [00-16423] (gva)
3/4/03	Filed order (Alfred T. GOODWIN): Aples Elk Grove Unified School District's motoin [sic] for a 90 day stay of mandate pending filing of a petition for writ of certiorari is granted. FRAP 41(d)(2). (phoned/faxed) [4670422-1] [00-16423] (gva)
5/5/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1574 filed on 4/30/03. (Panel) [00-16423] (gva)
5/15/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1624 filed on 4/30/03. [00-16423] (gva)
7/7/03	Received letter from the Supreme Court dated 6/30/03 re: The petition for a writ of certiorari in the above entitled case was filed on 6/26/03 and placed on the docket 6/30/03 as No. 03-7 (Panel) [00-16423] (gva)
10/20/03	Filed Supreme Court order, certiorari denied on 10/14/03. Supreme Court No.

	02-1574 [00-16423] (tm)
10/20/03	Filed Supreme Court order, certiorari denied on 10/14/03. Supreme Court No. 03-7 (Panel) [00-16423] (gva)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No.

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER;

Plaintiff,
v.

THE CONGRESS OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES; THE STATE OF CALIFORNIA; THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD"); DAVID W. GORDON, SUPERINTENDENT, EGUSD; THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD");DR. JIM SWEENEY, SUPERINTENDENT, SCUSD;
Defendants.

ORIGINAL COMPLAINT

Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This is a civil action claiming violations of the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America. As such, this Court has jurisdiction under 28 U.S.C. §§ 1331.

2. This action is founded upon the Constitution of the Unites [sic] States of America. As such, this Court has jurisdiction over Defendant United States of America under 28 U.S.C. §1346(a)(2).

3. This action is in the nature of mandamus, and seeks to compel the Congress of the United States of America, the President of the United States of America, the United States of America, its agents and its officers to perform their duties owed Plaintiff[1] under the terms of the First and Fifth Amendments of the Constitution of the United States. As such, this Court has jurisdiction under 28 U.S.C. §1361.

4. This action alleges that Defendants the State of California; the Elk Grove Unified School District; David W. Gordon, Superintendent, Elk Grove Unified School District; the Sacramento City Unified School District; and Dr. Jim Sweeney, Superintendent, Sacramento City Unified School District have deprived Plaintiff [1] of rights secured by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. As such, this Court has jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343 (3).

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[1] And his daughter, whom he represents as "next friend".

5. Defendants the Congress of the United States of America; the United States of America; and William Jefferson Clinton, President of the United States; is each an officer or employee of the United States or an agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States. Plaintiff resides in this judicial district. Venue is therefore proper under 28 U.S.C. §1391(e).

6. A substantial part of the events or omissions giving rise to this claim occurred, occur or will occur in the Eastern District of California. Venue is therefore proper under 28 U.S.C. §1391(b)(2).

7. Defendants the State of California; the Elk Grove Unified School District; David W. Gordon, Superintendent, EGUSD; the Sacramento City Unified School District; and Dr. Jim Sweeney, Superintendent, SCUSD, reside in Sacramento County, California. Venue is therefore proper under 28 U.S.C. §1391(b)(3).

PARTIES

8. Plaintiff Michael A. Newdow is a citizen of the United States, and a resident of the State of California.

9. Plaintiff's daughter, an unnamed plaintiff whom he represents as "next friend," is a citizen of the United States, and a resident of the State of California.

10. Defendant the Congress of the United States of America is the branch of government in which all legislative Powers are granted under Article I, Section 1 of the United States Constitution.

11. Defendant the United States of America is the constitutionally established government of the United States of America.

12. Defendant William Jefferson Clinton is the President of the United States, in whom is vested the executive Power under Article II, Section 1 of the United States Constitution. He is also the Commander in Chief of the Armed Forces of the United States under Article II, Section 2.

13. Defendant the State of California is one of the fifty sovereign United States. It has its own established government, subject to its own State Constitution. Both its government and its State Constitution are subject to the Constitution and the laws of the United States of America.

14. Defendant the Elk Grove Unified School District ("EGUSD") is the governing body responsible for operating, controlling and supervising all free public schools within the School District of Elk Grove, California.

15. Defendant David W. Gordon is the Superintendent of Schools for the Elk Grove Unified School District. He is responsible for the administration and management of the schools of the School District.

16. Defendant the Sacramento City Unified School District ("SCUSD") is the governing body responsible for operating, controlling and supervising all free public schools within the School District of the City of Sacramento, California.

17. Defendant Dr. Jim Sweeney is the Superintendent of Schools for the Sacramento City Unified School District. He is responsible for the administration and management of the schools of the School District.

CLAIM FOR RELIEF

18. This action is one of first impression, charging that the Congress of the United States of America violated the Religion Clauses of the First Amendment by altering the Pledge of Allegiance to include the words "under God." The pertinent facts follow.

19. In preparation for the 400th anniversary of Columbus's arrival in the New World, *The Youth's Companion* — a children's magazine based in Boston — published on September 8, 1892 the following short recitation:

> I pledge allegiance to my Flag and to the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.

20. With the support of President Benjamin Harrison, schools throughout the nation were encouraged to use that "pledge" that year as part of their Columbus Day festivities.

21. Subsequently, the nation's schools adopted this pledge to be recited daily (by the students, led by their teachers).

22. As increasing numbers of immigrants flowed into the country, "my Flag" became somewhat ambiguous. Thus, in 1923, those two words were replaced by "the flag of the United States." The phrase "of America" was appended a year later.

23. In 1942, Congress sent a joint resolution regarding an official Code of Flag Etiquette to President Franklin D. Roosevelt. The president approved the resolution and Public Law No. 622, 56 Stat. 380 took effect on June 22 of that year. Section (7) of that law contained the Pledge of Allegiance to the Flag of the United States of America (hereinafter "the Pledge"). It read:

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.

24. It is to be noted that there is and was nothing religious in the 1942 version of the Pledge.

25. The First Amendment of the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …"

26. In 1951, the Board of Directors of the Knights of Columbus — a proselytizing Catholic group — inserted "under God" after "one Nation" for their members to recite when uttering the Pledge.

27. Subsequent lobbying by the Knights of Columbus and other religious parties persuaded the United States Congress to pass its

Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (hereinafter "Act of 1954"). The sole legislative effect of that Act — as stated by Congress, itself — was to insert the two words "under God" into the previously secular Pledge.[2] As codified in 36 U.S.C. §172, the Pledge of Allegiance to the Flag of the United States of America now reads:

> I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

28. Any law that involves nothing but the endorsement of a religious ideal is unconstitutional on its face. ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993).)

29. On its face, the Act of 1954 did nothing except insert the words "under God" into the Pledge of Allegiance. It was and is, therefore, facially unconstitutional.

30. A law violates the Constitution if it is promulgated for a religious purpose. ("If there is to be assurance that the

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[2] "Section 7 of [the Act of June 22, 1942] contains the pledge of allegiance to the flag; and it is the purpose of this proposed legislation to amend that pledge by adding the words 'under God' so as to make it read, in appropriate part, 'one Nation under God, indivisible,'." H.R. 1693, 83rd Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Ad. News, vol. 2:2339, 2340.

Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question." Rosenberger v. University of Virginia, 515 U.S. 819, 838-839 (1995).)

31. The religious motivation behind this act can be readily appreciated by reading Congress's own narrative:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. **The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism** with its attendant subservience of the individual.
>
> H.R. 1693, 83rd Cong., 2nd Sess. (1954) (emphasis added).

32. Appendix B contains quotes from the Congressional Record.[3] These quotes further demonstrate that Congress's purpose in passing the Act of 1954 was incontrovertibly religious in nature.[4] Any governmental act passed with such a religious purpose is unconstitutional. ("Under the Lemon analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 592 (1989).)

33. In an attempt to publicize (and politicize) the passage of HJ Res 243 (the joint resolution that added the words "under God" to the Pledge of Allegiance), Congressman Oliver Bolton — a chief sponsor of the legislation — recommended that "a Protestant, a Catholic, and a Jew be in the group" picture of the principal sponsors of the bill as they joined President Eisenhower in his signing of the measure. (See Appendix C.) That only clergymen would be recommended to join these politicians provides further clear cut evidence that the purpose of the resolution was religious in nature.

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[3] There were no fewer than eighteen separate resolutions introduced in Congress - all with the purpose of inserting the religious words "under God" into the Pledge of Allegiance. These quotes are from the sponsors and supporters of those resolutions.

[4] The single, detestable and abhorrent quote that ""[sic] An atheistic American ... is a contradiction in terms" - provided by the Congressman who was credited as being the chief sponsor of the resolution - should, by itself, be sufficient to invalidate the act.

34. The use of the words "under God" in the Pledge of Allegiance is nothing but a religious act. ("To invoke Divine guidance on a public body ... is nothing but a religious act." Marsh v. Chambers, 463 U.S. 783, 797 (1983) (Brennan, J, dissenting).)

35. Other than endorsing theistic religious belief, there can be no purpose in adding the words "under God" to any prose. ("[I]t is clear that religious belief is the … Act's 'reason for existence.'" Edwards v. Aguillard, 482 U.S. 578, 603 (1987) (Powell, J., concurring).)[5]

36. Engaging in a ritual that not only declares the existence of "God," but declares that this nation exists "under God" is — by definition, intent and general understanding — religious activity.

37. President Eisenhower, in his address marking the passage of the Act of 1954, stated

> From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.[6]

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[5] In Aguillard, where the Court struck down a law that required the teaching of "creation science," the statute did "not contain explicit reference to its religious purpose." Id., at 604. In the instant case, the religiosity comprised the entire legislation!

[6] 100 Cong. Rec. 7, 8618 (June 22, 1954) (Statement by President Dwight D. Eisenhower, as reported by Sen. Ferguson.)

These words — by the President of the United States — demonstrate that the Act was not only promulgated for a religious purpose, but that it was intended to have a religious effect.

38. A law violates the Constitution if it has a religious effect. ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices" Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985).)

39. The effect of the insertion of the words "under God" into the Pledge of Allegiance has been for theistic Americans to perceive the Pledge as an endorsement of their theism, and for atheistic Americans, including Plaintiff, to perceive the Pledge as a disapproval of their atheism.

40. The view put forth in the Act of 1954 — that ours is a government that endorses a belief in God (especially one who exists as a "Creator") and that, as a nation, we "deny ... atheistic ... concepts" — has consistently been held to violate the First Amendment. Furthermore, not only is government expressly forbidden from endorsing any belief in God, but, under our Constitution, atheism is a religious belief system protected as strongly as theism. ("The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics." McGowan v. Maryland, 366

U.S. 420, 563-564 (1961) (Douglas, J., dissenting); "What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government." Abington [sic] School District v. Schempp, 374 U.S. 203, 319-320 (1963) (Stewart, J., dissenting); "At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (footnotes omitted). "A secular state establishes neither atheism nor religion as its official creed." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 610 (1989); "This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." City of Boerne v. Flores, Archbishop of San Antonio, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).)

41. In passing the Act of 1954, Congress not only had the purpose of endorsing theistic belief — a gross constitutional affront in its own right — but it actually explicitly denigrated the religious beliefs of the millions of American citizens that deny the existence of any supreme being. For those atheistic individuals to find that their "representatives" had placed such quotes as:

An atheistic American ... is a contradiction in terms,[7]

[W]hen Francis Bellamy wrote this stirring pledge, the pall of atheism had not yet spread its hateful shadow over the world,[8] and

The sordid records of the divorce courts, of the juvenile delinquency case histories, the tragedy of broken homes, wandering families, of the cheap price put on human life, the old heads on young children, the disrespect for authority, the contempt for law, the chiseling among those in authority, the lack of honor among the citizenry — all of this is the shame of America, the open sores of her secularist spirit[9]

into the Congressional record is a horror that exceeds even the most contemptible imaginable application of the First Amendment.

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[7] 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House of resolution to insert the words "under God" into the previously secular Pledge of Allegiance.)

[8] 100 Cong. Rec. 18 (Appendix), A3448 (May 11, 1954) (Letter entered into the records by Rep. George H. Fallon in support of the resolution to amend the previously secular Pledge of Allegiance.)

[9] 101 Cong. Rec. 18 (Appendix), A5920-A5921 (Aug. 2, 1955) (Article submitted by Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge.)

42. Plaintiff readily acknowledges that the majority of Americans — certain of their belief in the existence of a God — are completely blind to the offensiveness the words "under God" in the Nation's Pledge of Allegiance hold for Plaintiff and his religious brethren. Nonetheless, the rights of religious freedom are fundamental constitutional rights, and, as such, they must be examined from the perspective of those individuals whose rights are abridged. ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 894 (1992).)

43. Accordingly, with respect to the Religion Clauses, this "focus" is measured in terms of sectarianism, which — in constitutional terms — refers not only to beliefs held by any one religious sect, but to all religious beliefs that are not universal. In other words, any belief that is not adhered to by all is — from the point of view of the nonadherents — a sectarian belief.

44. Sectarianism — on the part of government — is forbidden by the First Amendment. ("[T]he *government's* use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 765 (1995) (emphasis in original).)

45. The phrase "under God" expresses a religious belief that is not adhered to by a significant segment of the population.[10] Again, this phrase is constitutionally sectarian, especially in the current American society which has become increasingly religiously diverse. ("This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 589 (1989).)

46. Sectarianism is often denied as such by legislators, scholars, "experts" and courts. Viewing themselves as broadminded because they have embraced religions and sects beyond their own, some such individuals fail to see that they still are taking a limited view when they don't embrace all religions and sects. In colonial New Jersey, for instance, those who set forth:

> That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this

[10] It is estimated that approximately 3-4% of Americans are atheists. This is double the percentage of the population that is Jewish (or a multitude of other non-Christian religions. For references, please see at footnotes 15 and 16.) The reader might then wonder what, constitutionally, would be the difference between "One Nation under Jesus" (endorsing a religious belief adhered to by 86% of the population) as opposed to "One Nation under God") (where the endorsed religious belief is adhered to by 94-96% of the population).

> Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.[11]

apparently felt themselves to be advocating nonsectarianism. New Jersey's Catholics likely felt otherwise. In Abington School District v. Schempp, 374 U.S. 203 (1963), it was noted that "Dr. Weigle stated that the Bible was non-sectarian." Id., at 210. Perhaps it was in response to Jewish objections that "[h]e later stated that the phrase 'non-sectarian' meant to him non-sectarian within the Christian faiths." Id. (quoting the trial court's summary). Similarly, when Representative Overton Brooks sponsored the introduction of a National Day of Prayer, he must have felt himself to be quite the liberal by encompassing "Catholics, Jewish and Protestants" in his definition of "all denominations." 98 Cong. Rec. 771 (1952). Would Muslim, Hindu and other Americans not take issue with that proclamation?

47. For atheists, of course, exclusion such as that noted in the preceding paragraph 46 is the norm. The endorsement of theism,

[11] Constitution of the State of New Jersey (1776), Secton XIX.

as a religious belief system in opposition to atheism, involves sectarianism exactly as occurs when Catholics are excluded from other Christians, Jews are excluded from other Judeo-Christians, and non-Judeo-Christians are excluded from other theists. Justice Blackmun, in Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 615 (1989), addressed this exact idea when he wrote that "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." And, similarly, the simultaneous endorsement of all theistic religions is no less constitutionally infirm than the endorsement of any one of those theistic religions alone.

48. Analogous sectarianism can be illustrated with regard to the Pledge. "One Nation under Jesus," for instance, is no different, constitutionally, from "One Nation under God."

49. In an effort to obscure the obvious, some have attempted to apply the rubric of "ceremonial deism" to phrases such as "under God." Even momentarily accepting this as a valid construct,[12] history shows that this was definitely not the case for the Act of 1954. In addition to the naked words of the legislators who passed this law, we can look to House Report 1693,[13] which included an opinion from W.C. Gilbert, Assistant Director of the Legislative Reference Service of the Library of Congress. Mr. Gilbert was

[12] Which, as Plaintiff will demonstrate in a future submission, it is not. The reader, in the meantime-as in footnote 10 above-might contemplate a First Amendment with "ceremonial Christianity," "ceremonial Catholicism," "ceremonial Buddhism," or any other "ceremonial" religious subcategory.

[13] H.R. 1693, 83rd Cong., 2nd Sess. (1954).

consulted in order to determine the appropriate placement of the words and punctuation, and he did this by determining "the exact meaning intended by the proposed insertion." Were "under God" to be used merely for ceremonial purposes, it would have been placed as a separate clause. Mr. Gilbert found that such placement was categorically **not** correct, and that "the insertion is intended as a general affirmance of the proposition that the United States of America is 'founded on a fundamental belief in God.'" That Congress chose to include Mr. Gilbert's opinion in its report proves unequivocally that any "ceremonial deism" claim is without any foundation.

50. Not only were the words "under God" in the Pledge viewed as religious when the Act of 1954 was passed, they have continued to be viewed in that manner ever since. In the current presidential election, for instance, potential candidates were interviewed by the Committee to Restore American Values, a part of the so-called "religious right." That committee specifically asked, "Would you support a removal of the words 'under God' from the Pledge of Allegiance?"[14] Joined by the executive director of the Christian Coalition, there can be no doubt as to the religious agenda the commission had in posing that question. This account further demonstrates the illusory notion behind any "ceremonial deism" claim.

51. Defendant William Jefferson Clinton, the President of the United States and Commander in Chief of the Armed Forces has

[14] *Religious Right Queries GOP Rivals,* Washington Post, Thursday, February 4, 1999, page A4.

been granted the power to modify the rules and customs of Patriotic Societies and Observances under 36 U.S.C. §178. Despite swearing to "preserve, protect and defend the Constitution of the United States," he has permitted and continues to permit the now-sectarian Pledge of Allegiance to the Flag to remain as stated in paragraph 27.

52. Defendant The Congress of the United States of America not only violated the Religion Clauses in its Act of 1954, but has — under Article I, Section 1 of the United States Constitution — permitted and continues to permit the now-sectarian Pledge of Allegiance to the Flag to remain as stated in paragraph 27. Thus, by not returning the Pledge to a constitutional form, Congress continues daily to violate the Constitution.

53. Plaintiff is a minister, having been ordained more than twenty years ago. His ministry espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology. It recognizes that it is never possible to prove that something does not exist, but finds that fact to be an absurd justification to accept the unproved. The bizarre, the incredible and the miraculous deserve not blind faith, but rigorous challenge. To plaintiff and his religious brethren, belief in a deity represents the repudiation of rational thought processes, and offends all precepts of science and natural law. Our religion incorporates the same values of goodness, hope, advancement of civilization and elevation of the human spirit common to most others. We, however, feel that all these virtues must ultimately be based on truth, and that they are only hindered by reliance upon a falsehood, which we believe any God to be.

54. Pursuant to the beliefs noted in the preceding paragraph 53, Plaintiff and his ministry are grossly offended by the phrase "under God" in the Pledge of Allegiance to the Flag of the United States of America. In fact, our religious beliefs are completely to the contrary, and — were Plaintiff and his ministry forced to reference God in the nation's Pledge of Allegiance to the Flag — they would do so with the phrase, " … one nation, under no God, indivisible, with liberty and justice for all." However, firmly believing in the principle of religious freedom which underlies the Establishment and Free Exercise Clauses noted in paragraph 25 above, Plaintiff and his ministry would vehemently fight the inclusion of such a reference.

55. Plaintiff's religious views are protected under the Establishment and Free Exercise Clauses noted in paragraph 25 above.

56. The phrase "under God" (as used in our now-sectarian Pledge of Allegiance to the Flag) requires a belief in "God" and assumes or implies that "God" occupies some high position. As such, this phrase is religious and deals with a theological question as is forbidden under the Federal Constitution. ("[T]he First Amendment[requires] ... on the part of all organs of government a strict neutrality toward theological questions" Abington School District v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring).)

57. To tell Plaintiff and his daughter that there is a God and enroll them in a governmentally-sponsored theistic milieu is no less an affront that it is to tell a Buddhist there is no Buddha, a Christian

there is no Jesus, a Muslim there is no Allah, and so on for every other faith.

58. The history, purpose and effect of the Act of 1954 was to endorse the ideas that (a) there is a God, and (b) that we are "one Nation under God." Such an endorsement violates the Federal Constitution. ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated." Grand Rapids School District v. Ball, 473 U.S. 373, 389 (1985).)

59. The phrase "under God" is in direct conflict with the views expressed in paragraph 53, which represent the religious views of Plaintiff and his ministry.

60. Views that deny the existence of a God are religious views, and are protected by the First Amendment as arduously as those views that are based on theism.

61. Plaintiff is a citizen of the United States. That a phrase offensive to the religious beliefs of Plaintiff and his ministry has been incorporated into the Pledge of Allegiance to the Flag of the United States of America — a nation whose Bill of Rights begins with the words "Congress shall make no law respecting an establishment of religion" — is a ludicrous and unconstitutional affront. It violates the Establishment Clause by endorsing theism,

and it violates the Free Exercise Clause by interfering with Plaintiff's ability to practice his religion free from governmental intrusion.

62. Plaintiff is a citizen of the United States of America, often proud of his nation. When he wishes to join his fellow citizens and pledge allegiance to the country's flag — as he has done and will continue to do in the future — extraneous and offensive (to Plaintiff) religious dogma is imposed as the phrase "one Nation under God" is uttered (as scripted in 36 U.S.C. §172). This impermissible interlarding violates the Establishment and Free Exercise Clauses of the very Bill of Rights underlying that pledge.

63. By way of the Fourteenth Amendment, the States are subject to the First Amendment of the Constitution. ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940)).

64. Article I (Declaration of Rights), Section 4 of the California State Constitution provides, in pertinent part:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed ... The Legislature shall make no law respecting an establishment of religion.

65. Article IX (Education), Section 8 of the California State Constitution provides, in pertinent part:

> No ... sectarian or denominational doctrine [shall] be taught, or instruction be permitted, directly or indirectly, in any of the common schools of this State.

66. The California State Education Code, Section 52720, states that:

> ... each day during the school year ... there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."

67. By specifically suggesting that the now-sectarian Pledge of Allegiance may be used in the State's public schools, Defendant the State of California had promulgated a rule that violates the Establishment and Free Exercise Clauses of the First Amendment of the Federal Constitution, and Article I, Section 4 and Article IX, Section 8 of the California State Constitution.

68. It is understood that by adopting Section 52720 of the Education Code, California has attempted to foster patriotism, and has assumed that the United States Congress acted constitutionally in its passage of the Act of 1954. However, in view of the obvious Federal and State Religion Clause violations, the State has no more right to accept the federal legislature's Religion Clause

transgressions than if [sic] does to accept those of its own legislature. (See, e.g., Walker v. Superior Court, 47 Cal. 3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988) (Mosk, J., concurring).)

69. If the State wishes to have a patriotic recitation, it can well recommend the secular, pre-1954 version of the Pledge or use some other nonsectarian prose altogether. In fact, under the strict scrutiny standard it must follow ("If a law effects a preference among religions, the governmental policy is presumptively suspect and subject to strict scrutiny." Walker v. Superior Court, 47 Cal. 3d 112, 145 (Mosk, J., concurring) (note 1)), the need to narrowly tailor legislation to meet any putative compelling interest mandates such a recommendation.

70. Defendant the Elk Grove Unified School District has promulgated its Rule AR 6115, which states in pertinent part that "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."

71. Due to the inclusion of the words "under God" in the Pledge of Allegiance to the Flag of the United States of America, Rule AR 6115 results in the daily indoctrination of the Elk Grove Unified School District's students — including Plaintiff's daughter — with religious dogma, as is expressly forbidden by the Constitution of the United States of America.

72. Defendant David W. Gordon, Superintendent of Schools, has permitted and continues to permit Rule AR 6115 to remain in force.

73. Defendant the Sacramento City Unified School District has promulgated its Rule AR 6115 (b), which states in pertinent part that "Each school shall conduct patriotic exercises daily. At elementary schools, such exercises shall be conducted at the beginning of each school day. The Pledge of Allegiance to the flag will fulfill this requirement."

74. Due to the inclusion of the words "under God" in the Pledge of Allegiance to the Flag of the United States of America, Rule AR 6115 (b) results in the daily indoctrination of the Sacramento City Unified School District's students with religious dogma, as is expressly forbidden by the Constitution of the United States of America.

75. Defendant Dr. Jim Sweeney, Superintendent of Schools, has permitted and continues to permit Rule AR 6115 (b) to remain in force.

76. Plaintiff is the father of a five year old daughter, who — since August, 1999 — has been enrolled in kindergarten in a public school within the Elk Grove Unified School District. Current plans are for her to complete her primary and secondary school years in either that school district or the Sacramento City Unified School District.

77. Plaintiff is an atheist.

78. Plaintiff, under the Free Exercise Clause, has an unrestricted right to inculcate in his daughter — free from governmental interference — the atheistic beliefs he finds persuasive. The

government's use of the words "under God" in the Nation's Pledge of Allegiance infringes upon this right. Such an infringement may not occur without a compelling state interest. No such compelling interest exists.

79. Plaintiff's daughter has been, currently is, and will in the future be subjected to the teacher-led recitation of the now-sectarian Pledge of Allegiance every day she attends the public schools. In other words, every school morning — under the aegis of the State — this child "of tender years" is compelled to watch and listen as her state-employed teacher in her state-run school leads her and her classmates in a ritual proclaiming that there is a God, and that ours is "one Nation under God." For the State to **ever** subject Plaintiff's daughter to such dogma — expressing and inculcating purely religious beliefs that are directly contrary to the religious beliefs of Plaintiff and the religious ideals he wishes to instill in his child — would be of questionable constitutionality. For it to do this every single school day for thirteen years — using Plaintiff's tax dollars, no less, to accomplish the affront — is an outrageous and manifest abuse of power in direct violation of the Religion Clauses of the constitutions of both the United States and the State of California. ("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).)

80. Plaintiff at times has himself attended — and will in the future attend — class with his daughter. During such times, he has been — and will in the future be — exposed to the teacher-led recitation of the Pledge of Allegiance. For Plaintiff, himself, to be subjected to this religious dogma while exercising his right to participate in

his child's education in the public schools also violates the Religion Clauses of the Constitutions of both the United States and the State of California.

81. Plaintiff is making no objection to the recitation of a patriotic Pledge of Allegiance. The government is certainly within its right to foster patriotism, and it may certainly make the determination that recitation of a Pledge of Allegiance serves that purpose. However, government may not employ or include sectarian religious dogma towards this end. ("[I]f a state passed legislation requiring the erection at every other street corner of a pole containing a stop sign with the word 'STOP' and a picture of Jesus Christ in the background, there is no doubt that a purpose of the statute would be to regulate the flow of traffic and require vehicles to stop. However, from a constitutional standpoint, the question that would have to be asked is: why the picture of Jesus Christ?" Cammack v. Waihee, 944 F.2d 466, 469 (9th Cir. 1991) (Reinhardt, Circuit Judge, dissenting from the denial of rehearing en banc).)

82. In 1998, the United States Department of Education issued a *Statement on Religious Expression in Public Schools*, which included a portion holding that "[t]eachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the Establishment Clause from soliciting or encouraging religious activity, and from participating in such religious activity with students." According to Secretary of Education Richard W. Riley's letter accompanying this statement, "schools may not endorse religious activity or doctrine." When teachers generally — and Plaintiff's daughter's teachers

specifically in the case at bar — lead their students in a daily recitation that states in part that we are "one Nation under God," they endorse religious doctrine and inculcate a belief that not only is there a God, but that we are one nation "under" that entity. This is unconstitutional. ("As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion." Agostini v. Felton, 521 U.S. 203, 223 (1997).)

83. On May 30, 1998, Defendant William Jefferson Clinton, President of the United States, broadcast to the nation his weekly radio address. The subject of that talk was "faith in our lives and in the education of our children." Mr. Clinton stated:

> Our founders believed the best way to protect religious liberty was to first guarantee the right of everyone to believe and practice religion according to his or her conscience; and second, to prohibit our government from imposing or sanctioning any particular religious belief. That's what they wrote into the First Amendment. They were right then, and they're right now.

Read from the perspective of atheistic Americans (such as Plaintiff), this passage can only be interpreted as meaning that the current sectarian Pledge — especially as recited daily in our public schools — is unconstitutional.

84. The indoctrination of his child against his will — to occur continuously for thirteen consecutive years — with a religious

viewpoint that Plaintiff feels is offensive is a violation of Plaintiff's fundamental constitutional privacy right of parenthood. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Id., at 851); Santosky v. Kramer, 455 U.S. 745 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974); Stanley v. Illinois, 405 U.S. 645, 651-652 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)." Id., at 753; "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." Id., at 774 (Rehnquist, C.J., dissenting).)

85. Plaintiff has attended and will continue to attend meetings of EGUSD and SCUSD. During those meetings — in both locales — the now-sectarian Pledge of Allegiance is routinely recited.

86. The recitation of the now-sectarian Pledge of Allegiance at the EGUSD and SCUSD meetings — as is the case when Plaintiff is present during the Pledge recitations in the classrooms or anywhere else — makes Plaintiff feel like an "outsider" due to his religious beliefs. This is prohibited by the First Amendment. ("If

government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).)

87. The recitation of the now-sectarian Pledge of Allegiance at the EGUSD and SCUSD meetings — or in the schools, or anywhere else, for that matter — endorses the religious view that there is a God. Such endorsement is prohibited by the First Amendment. ("Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement." Lee v. Weisman, 505 U.S. 577, 618 (1992) (Souter, J., concurring).)

88. Plaintiff wishes to serve on the School Board of either EGUSD or SCUSD. The data are clear that the voting public shuns atheists. Therefore, by making his atheism a key characteristic for which he will henceforth be known, Plaintiff's involvement in this lawsuit will essentially preclude him from obtaining elected office. This state of affairs results exclusively from the facts that (a) the Pledge now contains a sectarian religious component to which Plaintiff does not adhere, (b) the Pledge is routinely recited in Plaintiff's daughter's classes, and (c) the Pledge is routinely recited at the meetings of the School Boards of EGUSD and SCUSD.

89. Having the government place Plaintiff in the situation noted in the preceding paragraph 88 forces Plaintiff to choose between standing up for his constitutional rights or achieving political success. This unconstitutionally burdens his free exercise of religion. ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." Sherbert v. Verner, 374 U.S. 398, 404 (1963).)

90. Having the government place Plaintiff in the situation noted in paragraph 88 affects the political standing of Plaintiff. Such an effect violates the Establishment Clause. ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community." Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

91. The daily, governmentally mandated recitation, in the public schools, of any pledge containing a religious statement such as "under God" is a blatant violation of the Establishment Clause. Abington School District v. Schempp, 374 U.S. 203 (1963) ("[P]ublic schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort — an atmosphere in which children may assimilate a heritage common to all American groups

and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic." Id., at 241-242 (cites omitted) (Brennan, J., concurring))

92. The daily, governmentally mandated recitation, in the public schools, of any pledge containing a religious statement such as "under God," inflicted upon a child who holds religious beliefs offended by such a statement is a blatant violation of the Free Exercise Clause. Abington, 374 U.S. 203 (1963) ("In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request." Id., at 290. (Brennan, J., concurring)).

93. The Constitutional requirement that religion be kept separated from government is especially strict in the public schools. ("Our public school ... is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." Everson v. Board of Education, 330 U.S. 1, 23-24 (1947) (Jackson, J., dissenting); "We start down a rough road when we begin to mix compulsory public education with compulsory godliness." Zorach v. Clausen, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting); "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as

perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." McCollum v. Board of Education, 333 U.S. 203, 216-217 (1948) (Frankfurter, J., concurring); "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960); "[Academic freedom is] ... a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

94. Plaintiff's position as the father of a child attending the State's public schools grants him standing in this matter in his own right and on behalf of his daughter. Abington, 374 U.S. 203 (1963) ("First, the parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his own right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment — even though no special monetary injury could be shown." (Id., n. 30) (Brennan, J., concurring).)

95. Plaintiff has had contact with officials of his child's elementary school and the Elk Grove Unified School District,

including Defendant David W. Gordon, Superintendent. Superintendent Gordon has written that "[o]ur attorneys have advised us that federal law allows the recitation of the Pledge of Allegiance including the phrase 'under God.'" Plaintiff's disagreement with that assessment is the crux of this action.

96. Superintendent Gordon also wrote that "that there is no establishment clause violation as long as students are free not to participate." This issue of "coercion" is certain to be raised repeatedly by the defendants. In anticipation, Plaintiff will state here and now that (a) coercion in not a necessary element for an Establishment Clause violation, and (b) there is coercion when elementary school students are led by their teachers in the daily recitation of the Pledge.

97. The Supreme Court has unequivocally stated that coercion is unnecessary to show an Establishment Clause violation. ("The absence of any element of coercion ... is irrelevant to questions arising under the Establishment Clause. In School District of Abington Township v. Schempp ... it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument." Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973).)

98. Defendant William Jefferson Clinton, in the radio address noted in paragraph 83, *supra*, also stated that students "have the right to be free from coercion to participate in any kind of religious activity in school."

99. Even if coercion were a necessary element to show an Establishment Clause violation, the Supreme Court has ruled that coercion exists even when an individual is not forced to actively participate in an activity. In Lee v. Weisman, 505 U.S. 577 (1992), high school students were found to be coerced as a matter of law when a benediction was held at their high school graduation ceremonies. If coercion was present in that situation, it certainly must be present during recitations of the Pledge of Allegiance where each coercive element is even more forcefully present. (Please see Appendix D.) ("[W]ithout exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation **or attendance at** a religious activity." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 660 (1989) (Kennedy, J., dissenting in part, concurring in part) (citations omitted) (emphasis added).)

100. That this coercion exists provides proof, on its own, that the Establishment Clause has been violated. ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion. Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).)

101. It is not an answer to maintain that Plaintiff and his daughter can "opt out" of the Pledge. To begin with, requiring any citizen to alter his/her behavior in order to avoid a governmental abridgment of his/her constitutional rights is itself a violation of

those rights. Secondly, Plaintiff has met with his daughter's teacher and the school principal to discuss this option. It was found that it is not possible to accomplish such an "opt out" without his daughter and her classmates realizing that she is "an outsider," in direct violation of the Religion Clauses.

102. Atheists are a disenfranchised minority in this nation. National polls have revealed that 93-96% of Americans believe in God — only 3% to 4% do not.[15] [16] In 1946, 57% of Americans felt that atheists should be denied the opportunity to even broadcast their religious views on radio.[17] In the 1950's, three quarters of the population stated they would not vote for an atheist running for president even if he[18] were otherwise qualified.[19] In 1965, 27% of the population stated that they didn't think atheists should even be

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[15] Louis Harris and Associates, August 12, 1998; Opinion Dynamics, December 5, 1997.

[16] Pew Research Center for the People and the Press, May 31 through June 9, 1996.

[17] Gallup Poll-A.I.P.O. (December 18, 1946).

[18] The poll did not, apparently, consider women as potential candidates: "If your party nominated a generally well-qualified man for president and he happened to be an atheist, would you vote for him?" Gallup Poll-A.I.P.O. (September 15, 1958).

[19] The poll looked into other religions and race as well. The results are revealing: Would not vote for a: Baptist (4%), Catholic (27%), Jew (29%), Negro (54%), Atheist (77%), Id.

allowed to vote![20]

103. The numbers given in the preceding paragraph 102 do not just reflect an "unenlightened" populace from years past; current data reveal that still only a third of the population would vote for an atheist candidate.[21]

104. Incredibly, the constitutions of at least six states[22] still have clauses denying to atheists the right to hold public office and/or testify in a court of law! Although these clauses are now legal nullities, the fact that they remain — unchanged for all the world to see — on the most vital document in each of those states, powerfully demonstrates the extreme political disenfranchisement of atheists.[23]

105. Each of the Defendants William Jefferson Clinton, the

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[20] Gallup Poll-A.I.P.O. (July 21, 1965). In contrast, when asked if "people who have quit school and never completed high school" should be allowed to vote, only 6% of the population felt that group should be excluded.

[21] Jelen T and Wilcox C. Public Attitudes Toward Church and State (M.E. Sharpe, Armonk, NY 1995), page 45.

[22] Arkansas, Maryland, North Carolina, South Carolina, Tennessee, Texas.

[23] If this point needs to more strongly be made, one need only ponder how long phrases such as "no [Jew[shall hold any office under this Constitution" (South Carolina State Constitution, Article XVII, Section 4) or "no [African-American] shall hold any office in the civil department of this state" (Tennessee State Constitution, Article IX, Section 2) would persist in today's society.

President of the United States; David W. Gordon, Superintendent, EGUSD; and Dr. Jim Sweeney, Superintendent, SCUSD has a sworn duty to uphold and/or abide by the Constitution of the United States. Specifically, each must act to prevent the creation, execution or perpetuation of laws which endorse any form of religion — including theism — in violation of the Establishment Clause; and each must act to prevent the creation, execution or perpetuation of laws which interfere with the ability of Plaintiff and his daughter in practicing their religion(s) free from governmental intrusion. By the actions and the circumstances enumerated above, in addition to other actions and circumstances, each of these Defendants has failed to perform and continues to fail to perform his sworn duty.

106. Each of the Defendants the Congress of the United States of America; the United States of America; the State of California; the Elk Grove Unified School District; and the Sacramento City Unified School District is a governmental entity obligated to ensure that the Constitution of the United States of America is upheld. By the actions and the circumstances enumerated above, in addition to other actions and circumstances, each of these Defendants has failed to maintain and continues to fail to maintain its obligation.

107. Each of the Defendants the State of California; the Elk Grove Unified School District; and the Sacramento City Unified School District is a governmental entity obligated to ensure that the Constitution of the State of California is upheld. By the actions and the circumstances enumerated above, in addition to other actions and circumstances, each of these Defendants has failed to

maintain and continues to fail to maintain its obligation.

108. Each of the Defendants David W. Gordon, Superintendent, Elk Grove Unified School District; and Dr. Jim Sweeney, Superintendent, Sacramento City Unified School District has an obligation to ensure that the Constitution of the State of California is upheld. By the actions and the circumstances enumerated above, in addition to other actions and circumstances, each of these Defendants has failed to maintain and continues to fail to maintain his obligation.

109. Plaintiff pays taxes to the United States, to the State of California and to the County of Sacramento.

110. Numerous federal, state and local governmental employees — using governmental facilities — recite the now-sectarian Pledge of Allegiance while being paid from the government coffers. These employees include, but are not limited to, members of the United States Senate, members of the United States House of Representatives, and the school board members and teachers of the Elk Grove and Sacramento City Unified School Districts.

111. The recitation of the now-sectarian Pledge of Allegiance by any of the above-referenced governmental employees while performing their duties involves the use of Plaintiff's tax money in a religious exercise as prohibited by the First Amendment.

112. The tax moneys noted in paragraph 109 are used in the education of the County's, the State's and the Nation's schoolchildren. Presently included in that "education" is the

repeated recitation of the now-sectarian Pledge of Allegiance, which indoctrinates all the schoolchildren — including Plaintiff's daughter — with the religious dogmas that (a) there exists a god, and that (b) we are "one Nation under God." The aforementioned tax moneys are used to pay for (i) the teachers' salaries, (ii) the flags and other items, (iii) the physical plant (including the classrooms), and (iv) the utilities of the classrooms. ("[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, *Memorial and Remonstrance against Religious Assessments*, II Writings of Madison 183, at 185-186.)

113. Federal tax money is used to print the United States Code (including 36 U.S.C. §172) as well as pamphlets, etc., that contain the Pledge of Allegiance.

114. Federal, California State and Sacramento County tax moneys are used when the Pledge is recited at federal, state and county governmental functions.

115. Federal tax money is used to support the "Pause for the Pledge of Allegiance" (Pub. L. 99 Stat. 97) annual festivities.[24]

116. The preceding examples show that Plaintiff's tax moneys are used for governmental functions designed to bolster the use and status of the Pledge of Allegiance to the Flag. The taking by the government of Plaintiff's (and the rest of the citizenry's) personal wealth to be used to advocate a Pledge that places the government's imprimatur on a religious belief to which Plaintiff does not adhere is a violation of both the Establishment and Free Exercise clauses.

117. Some (if not all) of the federal dollars spent in the activities noted in paragraphs 110 through 115 are apportioned under the taxing and spending clause of Article I, Section 8 of the Constitution of the United States. ("[F]ederal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, 8, of the Constitution." Bowen v. Kendrick, 487 U.S. 589, 618 (1988).)

118. Article XVI (Public Finance), Section 5 of the California State Constitution provides in pertinent part, that:

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[24] Sponsored by The National Flag Day Foundation, this event involves the participation of thousands of Maryland school children, a high school choir, use of governmental buildings, a concert given by the 229th Maryland Army National Guard band, and a "Fly-over" by jets of the 175th Wing Maryland Air National Guard. The estimated cost to taxpayers of the Fly-over, along, is on the order of $10,000.00.

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, ... nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever.

119. By allowing — and encouraging — the continued use of the now-sectarian Pledge, and by utilizing tax money as noted above, the State of California is making appropriations in aid of theistic religious belief, thereby violating California State Constitution Article XVI, Section 5.

120. Plaintiff has considered teaching elementary school students in the EGUSD public schools. Were he to take such a position, Rule #6115 would require that he violate either that rule or his conscience. Placing Plaintiff in this untenable position is exactly the type of harm the Establishment and Free Exercise Clauses are designed to preclude. Thus, those Clauses are violated by Rule #6115. Sherbert v. Verner, 374 U.S. 398 (1963).

121. Were he to take a job teaching elementary school students in either the EGUSD or the SCUSD, Plaintiff's religious beliefs would preclude him from following Rule #6115 or 6115 (b). Thus, those charged with school administration — government actors —

would become entangled in a religious conflict by monitoring Plaintiff's activities. This entanglement is forbidden under the First Amendment. ("[S]urveillance creates an entanglement of government and religion which the First Amendment was designed to avoid." Tilton v. Richardson, 403 U.S. 672, 694 (1971) (Douglas, J., concurring in part and dissenting in part).)

122. Establishment Clause restrictions are especially austere in elementary schools. Thus, even if there were some non-religious justification for the placement of the words "under God" into the Pledge and the daily recitation of those words — which, it must be repeated, there is not — that justification would never meet the burden necessary to warrant the abridgment of fundamental Religion Clause liberties. ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary." Edwards v. Aguillard, 482 U.S. 578, 583-584 (1987).)

123. There is an overwhelming amount of dicta that supports Plaintiff's position in this case. Appendix E (revealing quotes from twenty-six separate justices), Appendix F (yielding more than fifty separate statements from Lee v. Weisman alone), and Appendix G (providing two hundred instances) all demonstrate that the current Pledge is inconsistent with the Constitution's guarantees.

124. Plaintiff expects that Defendants will make attempts to deflect his challenge by pointing to the exceedingly rare instances of what, in fact, only appear to be contrary Supreme Court dicta. It should be appreciated right off that none of those dicta — as opposed to the myriad quotes that Plaintiff has provide in his Pleading (including appendices) here — are based on reason, logic or principle, and Plaintiff will specifically respond to these attempts at the appropriate time. For now, however, it should be noted that the Ninth Circuit has recently addressed the issue of insufficient dicta in Batjac Prods. Inc. v. Goodtimes Home Video Corp., 160 F.3d 1223 (9th Cir. Cal. 1998). In Batjac — a case that (unlike the case at bar) did **not** involve fundamental constitutional rights — Supreme Court dicta were deemed not to be controlling. Endorsing the approach taken by the Seventh Circuit in United States v. Crawley, 837 F.2d 291 (7th Cir. 1988), the Court looked at four "reasons for rejecting dicta." Plaintiff anticipates that each of those reasons will be present in every instance of dicta brought by Defendants, [sic]

125. The mountain of reasoned and principled dicta supporting Plaintiff's claim stands in stark contrast to the pimple of opposing statements, and any just analysis of the issue will easily demonstrate that Plaintiff must prevail in this action. The phrase "under God" as it exists in the Pledge of Allegiance to the Flag of the United States of America is violative of the Religion Clauses of the First Amendment.

126. Precluding Plaintiff from making his claims in this case by following the minimal and poor-quality dicta that Defendants are likely to present would violate the Due Process Clauses of the

Fifth and Fourteenth Amendments.

127. In contrast to the questionable deference to be accorded the ancillary dicta Defendants will likely present, on-point holdings are of the utmost precedential value. The Supreme Court has ruled in three similar instances involving public school students, each time finding that the states' involvement with religion violated the First Amendment. Engel v. Vitale, 370 U.S. 421 (1962) (daily prayer), Abington School District v. Schempp, 374 U.S. 203 (1963) (daily Bible-reading) and Lee v. Weisman, 505 U.S. 577 (1992) (annual graduation benedictions by clergy) provide unequivocal evidence that the recitation of the words "under God" in the Pledge — as with prayer, Bible-readings and benedictions — cannot be countenanced under our Constitution.

128. The differential treatment of atheists as compared with theists as it relates to the use of the words "under God" in the now-sectarian Pledge violates the guarantees of Equal Protection inherent in the Fifth and Fourteenth Amendments.

129. In addition to its constitutional infirmities, the placement of the words "under God" into the Pledge of Allegiance is void as against public policy. The very purpose of the Pledge of Allegiance to the Flag — as can be appreciated from the legislative history behind the initial Act of 1942 — is to provide a means of demonstrating patriotism and engendering national unity. By placing the religious words "under God" into the Pledge, Congress not only interfered with the patriotism and national unity the Pledge was meant to engender, but it actually fostered divisiveness ... in a manner expressly forbidden by the

Constitution.

130. In the fall of 1998, a few months after her fourth birthday, Plaintiff's daughter came to his side. Pondering the Pledge's possible effects, Plaintiff recited it to her in its pre-1954 form. After hearing "... one Nation, indivisible, with liberty and justice for all," that child — without a second's pause — immediately shouted "under God"! Plaintiff at the time didn't even know she had ever even heard the Pledge before. Yet, apparently from her days in pre-school, she **immediately** recognized that her father had "left out" those two words.

131. The occurrence noted in the preceding paragraph 130 clearly demonstrates the adverse effect the daily recitation of the Pledge has on the ability of atheists in general, and Plaintiff in particular, to raise their children free from religious governmental interference.

132. The occurrence noted in paragraph 130 clearly demonstrates the adverse effect the daily recitation of the Pledge has on the ability of Plaintiff's daughter to receive the message of atheism Plaintiff wishes to instill — and has the right to instill free from religious governmental interference — in her.

WHEREFORE, Plaintiff prays for relief and judgment as follows:

I. To declare that Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses of the United States Constitution;

II. To declare that by including "under God" in the Pledge of Allegiance to the Flag of the United States of America, 36 U.S.C. §§ 172 violates the Establishment and Free Exercise Clauses of the United States Constitution;

III. To demand that Defendant the Congress of the United States of America immediately act to remove the words "under God" from the Pledge of Allegiance to the Flag as now written in 36 U.S.C. §172;

IV. To demand that Defendant William Jefferson Clinton, the President of the United States of America, alter, modify or repeal the Pledge of Allegiance to the Flag by removing the words "under God" as required under 36 U.S.C. §178 in conjunction with his oath to defend and uphold the Constitution of the United States of America;

V. To demand that Defendant the State of California immediately act to alter, modify or repeal Education Code §52720 so that the use of the now-sectarian Pledge of Allegiance is forbidden in the public schools.

VI. To demand that Defendants the Elk Grove Unified School District; David W. Gordon, Superintendent, EGUSD; the Sacramento City Unified School District; and Dr. Jim Sweeney, Superintendent, SCUSD forbid the use of the now-sectarian Pledge of Allegiance in the public schools within their jurisdictions;

VII. To allow Plaintiff to recover costs, expert witness fees, attorney fees, etc. as may be allowed by law; and

VIII. To provide such other and further relief as the Court may deem proper.

Respectfully submitted,

Michael Newdow, Plaintiff
First Amendmist Church of True Science
PO Box 233345
Sacramento CA 95823
(916) 427-6669

CERTIFICATE OF SERVICE (Omitted)
APPENDIXES (Omitted)

No. 90. Religious Preference, Church Membership, and Attendance: 1980 to 1997

[In percent. Covers civilian noninstitutional population, 18 years old and over. Data represent averages of the combined results of several surveys during year or period indicated. Data are subject to sampling variability, see source]

YEAR	RELIGIOUS PREFERENCE					Church/ synagogue members	Persons attending church/ synagogue [1]	AGE AND REGION	Church/ synagogue members, 1997
	Protestant	Catholic	Jewish	Other	None				
1980	61	28	2	2	7	69	40	18-29 years old	63
1985	57	28	2	4	9	71	42	30-49 years old	66
1990	56	25	2	6	11	65	40	50-64 years old	71
1993	57	26	1	8	8	68	40	65 years and over	75
1994	60	24	2	8	8	68	42	East [3]	70
1995	58	25	2	(NA)	(NA)	69	43	Midwest [4]	73
1996	58	25	3	5	10	65	38	South [5]	73
1997	58	26	2	8	8	67	40	West [6]	51

NA Not available. [1] Persons who attended a church or synagogue in the last 7 days. [2] Includes those respondents who did not designate. [3] ME, NH, RI, NY, CT, VT, MA, NJ, PA, WV, DE, MD, and DC. [4] OH, IN, IL, MI, MN, WI, IA, ND, SD, KS, NE, and MO. [5] KY, TN, VA, NC, SC, GA, FL, AL, MS, TX, AR, OK, and LA. [6] AZ, NM, CO, NV, MT, ID, WY, UT, CA, WA, OR, AK, and HI.

Source: Princeton Religion Research Center, Princeton, NJ, *Religion in America*, annual. Based on surveys conducted by the Gallup Organization, Inc.

No. 91. Christian Church Adherents, 1990, and Jewish Population, 1996—States

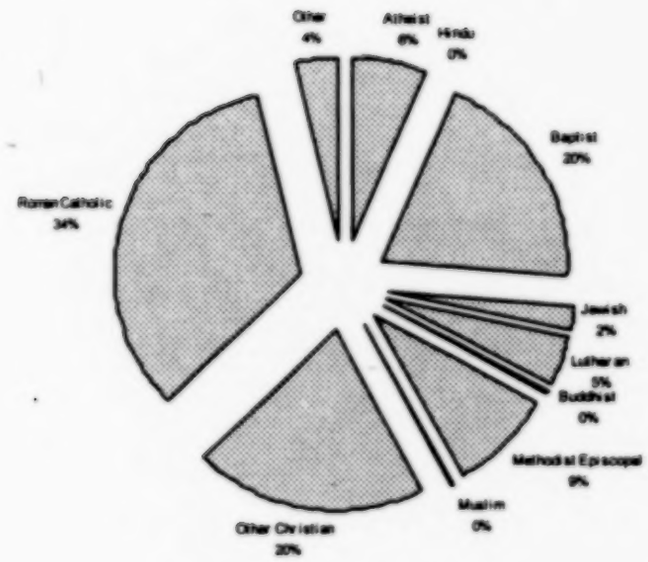
[Christian church adherents were defined as "all members, including full members, their children and the estimated number of other regular participants who are not considered as communicant, confirmed or full members." Data on Christian church adherents are based on reports of 133 church groupings and exclude 34 church bodies that reported more than 100,000 members to the *Yearbook of American and Canadian Churches*. The Jewish population includes Jews who define themselves as Jewish by religion as well as those who define themselves as Jewish in cultural terms. Data on Jewish population are based primarily on a compilation of individual estimates made by local Jewish federations. Additionally, most large communities have completed Jewish demographic surveys from which the Jewish population can be determined]

REGION, DIVISION, AND STATE	CHRISTIAN ADHERENTS, 1990		JEWISH POPULATION, 1996		REGION, DIVISION, AND STATE	CHRISTIAN ADHERENTS, 1990		JEWISH POPULATION, 1996	
	Number (1,000)	Percent of population [1]	Number (1,000)	Percent of population [1]		Number (1,000)	Percent of population [1]	Number (1,000)	Percent of population [1]
U.S.	131,084	52.7	5,998	2.2	MO	2,892	58.8	62	1.2
AL	2,858	70.7	9	0.2	MT	341	42.7	1	0.1
AK	175	31.8	3	0.5	NE	1,000	63.4	7	0.4
AZ	1,505	41.1	72	1.8	NV	368	29.8	21	1.4
AR	1,423	60.5	2	0.1	NH	431	38.9	10	0.8
CA	11,665	39.2	821	2.9	NJ	4,305	55.7	435	5.5
CO	1,244	37.8	52	1.4	NM	883	58.3	9	0.5
CT	1,933	58.9	97	3.0	NY	9,970	55.5	1,852	9.1
DE	297	44.8	14	1.9	NC	3,949	59.6	22	0.3
DC	349	57.5	26	4.6	ND	485	75.9	1	0.1
FL	5,108	39.5	644	4.5	OH	5,313	48.9	129	1.2
GA	3,659	56.5	84	1.2	OK	2,097	66.5	6	0.2
HI	391	35.3	7	0.6	OR	904	31.8	20	0.6
ID	507	50.4	(Z)	0.1	PA	6,980	58.6	325	2.7
IL	6,579	57.5	268	2.3	RI	754	75.1	16	1.6
IN	2,615	47.1	18	0.3	SC	2,149	61.7	9	0.2
IA	1,674	60.3	6	0.2	SD	474	68.1	(Z)	0.1
KS	1,348	54.3	15	0.6	TN	2,968	60.8	18	0.3
KY	2,213	60.1	11	0.3	TX	10,788	63.5	113	0.8
LA	2,959	70.1	17	0.4	UT	1,371	79.6	4	0.2
ME	439	36.1	8	0.6	VT	233	40.4	8	1.9
MD	2,101	43.9	212	4.2	VA	2,898	46.8	75	1.1
MA	3,668	60.9	268	4.4	WA	1,579	32.4	34	0.8
MI	4,580	49.2	107	1.1	WV	740	41.3	2	0.1
MN	2,807	64.2	42	0.9	WI	3,125	63.9	29	0.6
MS	1,804	70.1	1	0.1	WY	216	47.8	(Z)	0.1

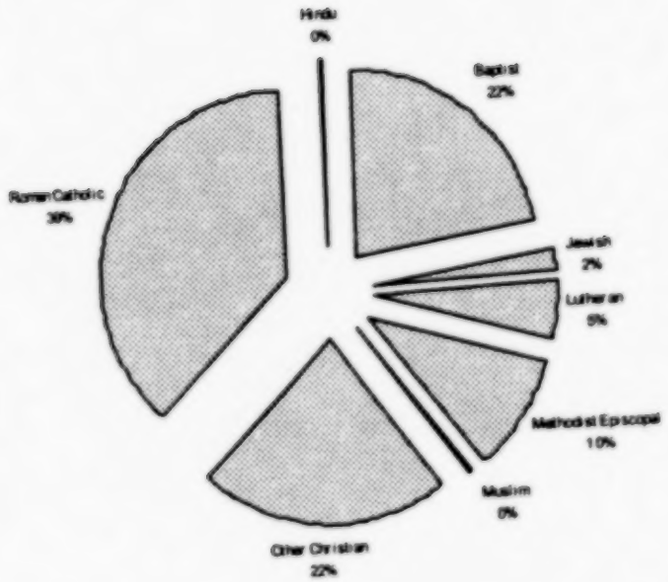
Z Fewer than 500. [1] Based on U.S. Bureau of the Census data for resident population enumerated as of April 1, 1990, and estimated as of July 1, 1996.

Source: Christian church adherents—M. Bradley; N. Green, Jr.; D. Jones; M. Lynn; and L. McNeil; *Churches and Church Membership in the United States 1990*; Glenmary Research Center, Atlanta, GA, 1992 (copyright); Jewish population—American Jewish Committee, New York, NY, *American Jewish Year Book, 1998* (copyright).

ALL AMERICANS



ALL THEISTS



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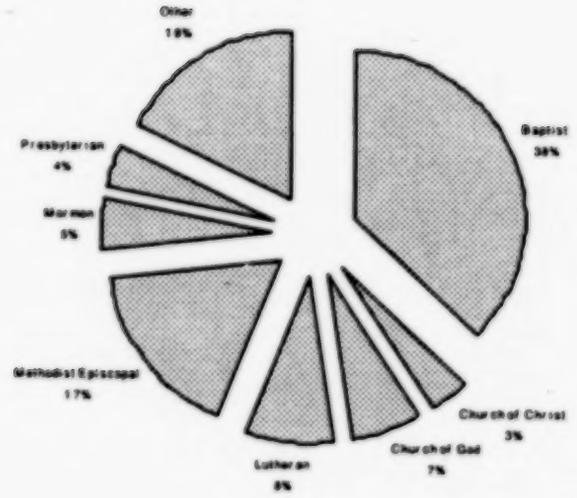

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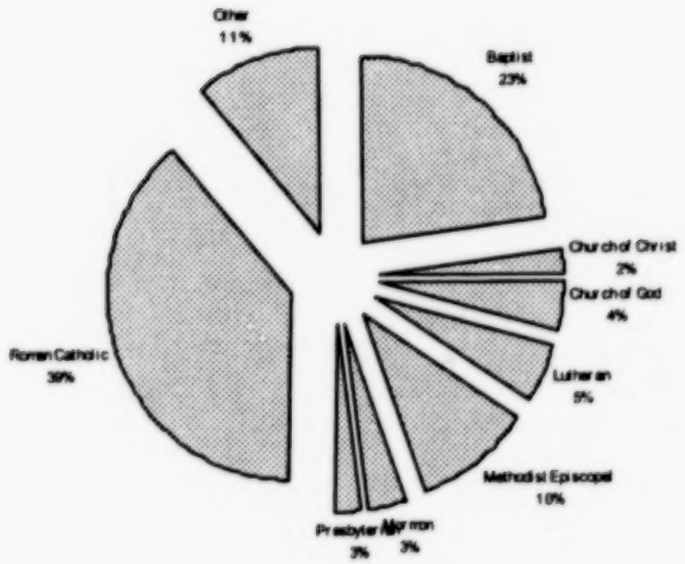

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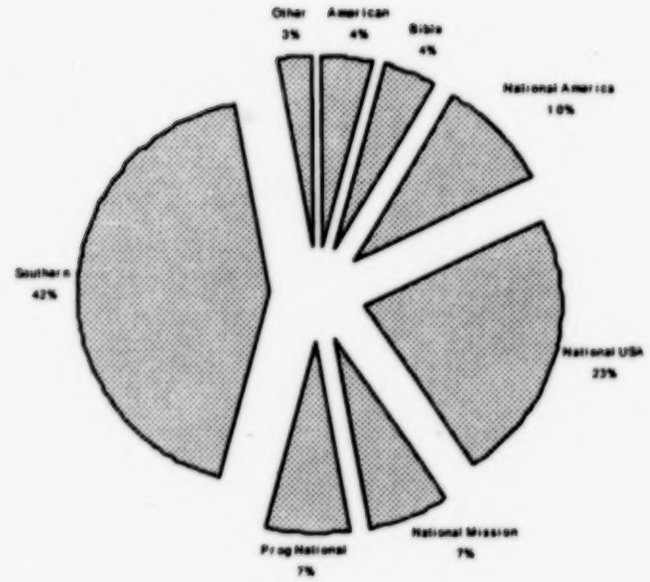

FILED
MAY 25 2000
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff,

v.

THE CONGRESS OF THE UNITED STATES, et al.,

Defendants.

CIV. S-00-0495 MLS PAN PS

FINDINGS AND RECOMMENDATION

On March 8, 2000, plaintiff filed a complaint alleging defendants Elk Grove School District and Sacramento City Unified School District violate the Establishment Clause of the First Amendment by requiring teachers lead morning classes in recitation of the pledge of allegiance. Defendant school districts move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The only federal Court of Appeal directly to address this issue held that schools may lead the pledge of allegiance without violating the First Amendment so long as pupils are not compelled

to participate, because the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs. Sherman v. Community Consolidated School District, 980 F.2d 437, 442-448 (11th Cir. 1992). While the Supreme Court has not directly addressed the issue, it has noted that its "previous opinions have considered in dicta the motto ['In God We Trust'] and the pledge [of allegiance], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 602-03 (1989); see also id. at 625 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); id. at 716-17 (Brennan, J., dissenting); School District of Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring); Engle v. Vitale, 370 U.S. 421. 449-50 (1962)(Stewart, J., dissenting). Two Courts of Appeal have stated, also in dicta, that the pledge is not an endorsement of religion. See Chandler v. James, 180 F.3d 1254, 1262 (11th Cir. 1999); Separation of Church and State Committee v. City of Eugene, 93 F.3d 617, 622 (9th Cir. 1996).

The Seventh Circuit's decision in Sherman and the statements in dicta noted above, while not binding on this court, are persuasive and directly on point. Whether the court employs the test set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), or the more recent endorsement test, see Allegheny, *supra*, 492 U.S. at 593-594, the Pledge does not violate the Establishment Clause of the First Amendment. Accordingly, I recommend plaintiff's complaint be dismissed.

DATED: May 25, 2000.

/s/ PETER A. NOWINSKI
Peter A. Nowinski
United States Magistrate Judge

(Certificate of service omitted for printing)

STEPHAN W. PARRISH, Bar No. 82620
FOLEY & LARDNER
Attorneys at Law
One Maritime Plaza, Sixth Floor
San Francisco, California 94111-3404
Telephone: (415) 434-4484
Facsimile: (415) 434-4507

Attorneys for Intervenor Sandra Banning

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE REVEREND DR. MICHAEL A. NEWDOW	)	No. 00-16423
Plaintiff-Appellant,	)	
v.	)	District Court No. 00-0495 (E.D. Calif., Sacramento)
THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.	)	
Defendants-Appellees.	)	

DECLARATION OF SANDRA BANNING IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE, OR ALTERNATIVELY, TO DISMISS THE COMPLAINT

I, Sandra Banning, declare as follows:

1. I am the mother of the minor child whose biological father is Michael A. Newdow, the Appellant. I an not now and have never been married to Mr. Newdow.

2. Since February 6, 2002, I have had sole legal custody of my daughter, including the sole right to represent her legal interests and make all decision about her education, under the provision of an order of the Superior Court of Sacramento, County, California, a true copy of which is attached hereto. *See* Minute Order for Hearing on February 6, 2002, *Sandra L. Banning v. Michael A. Newdow,* Case No. 99FL04312 (Cal. Super. Ct. (Sacramento) Feb. 6, 2002) (entering as an order "effective forthwith" the decision to "Adopt 730 evaluation," including "Recommendation 1," of that evaluation that "The child's mother, Ms. Banning, to have sole custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [First Name Redacted] Banning") (emphasis in original) [attached in pertinent part].

3. Mr. Newdow and I share physical custody of the child. However, as my daughter's parent with exclusive legal custody, I and not Mr. Newdow am the sole adult lawfully authorized to represent her legal interest before any court,

including this Court, under California law.

4. My daughter is a Christian who regularly attends church, and she believes in God. Therefore, my daughter does not share Mr. Newdow's atheist belief that there is no God, as he implies in paragraph fifty-seven (¶ 57) of his Original Complaint below when he states that "[t]o tell Plaintiff ***and his daughter*** that there is a God and enroll them in a governmentally-sponsored theistic milieu is" and "affront." My daughter does not object to and is not uncomfortable with either personally reciting, or hearing others recite, the Pledge of Allegiance in her elementary school or elsewhere, and in particular she does not object to and is not uncomfortable with the Pledge's reference to God.

5. I have long been aware of Mr. Newdow's atheist beliefs, and of his efforts in various legal proceedings to have governmental referenced to "God" declared unconstitutional. But prior to the Ninth Circuit panel decision in this matter released on June 26, 2002, I had been only vaguely aware that Mr. Newdow had challenged the legality of the Pledge of Allegiance. I was not aware that Mr. Newdow had filed the underlying cause of action based, at least in part, upon the claim that he was my daughter's "next friend." *See* Original Complaint ¶ 9; *see also* Brief of the Plaintiff/Appellant Appealing District Court's Order Granting Defendants' Motion to Dismiss at viii n.2 (claiming to represent "his daughter" as "next friend"), *Newdow v. The Congress of the United States et al.*, ___ F.3d ____, 2002 WL 1370796 (9th Cir. June 26, 2002) (No. 00-16423) [hereinafter "Appellant's Brief"].

6. Indeed, prior to June 26, 2002, I was entirely unaware that Mr. Newdow had filed his cause of action in part by naming my daughter as one of the "Parties" and an "unnamed plaintiff." Original Complaint at 3 and ¶ 9. As my daughter's sole legal custodian, and the only person with the legal authority to represent my daughter's interests in any legal action, I believe it is not in my daughter's interest to be party to this cause of action, I would never have granted permission for her to be party to this cause of action had I been asked by Appellant or any other person or court, and I do not wish for her to continue being party to this cause of action.

7. I became aware of the assertion that my daughter was "injured" for purposes of the Constitution's "case or controversy" requirement in Article III by having to recite or hear recited the Pledge in her school only as a result of the extensive publicity given to the decision in this appeal by this Court. Upon further review of the pleadings in this matter, I have also learned that Mr. Newdow asserts that "his young daughter ... is *coerced* to countenance the public school-sponsored religious views that (a) there is a God and (b) we are 'on Nation under God.'" Appellant's Brief at 8 (emphasis added).

8. I myself am a Christian and am raising my daughter as one, which includes a belief that God exists.

9. Neither I nor my daughter believe that she is either "injured" or "coerced" by having to recite, or hear recited, the words "one Nation under God," as such recitation is consistent with my beliefs, my daughter's beliefs, and the environment in

which I as her sole legal custodian wish to have her educated. Contrary to the relief requested by Appellant in this matter, it is my intent as her sole legal custodian, and my daughter's intent, that as an elementary school student she daily recite the Pledge of Allegiance as it currently stands, including the portion stating that we are "one Nation under God."

10. As the sole legal custodian of my daughter, it is my belief that my daughter will be harmed if this cause of action is permitted to proceed, as Appellant alleges in part, on my daughter's behalf through him. Neither I nor my daughter share his views regarding the existence of God, nor the propriety of stating we are "one Nation under God" in the Pledge of Allegiance. If this matter proceeds based in any part upon Appellant's factually inaccurate allegation that my daughter's own, as opposed to his, constitutional rights are injured by reciting the Pledge as it currently stands, then I believe that my daughter will be wrongfully viewed by this Court, the state and local governments, those in her school system, and the public, as sharing Appellant's atheist views, which she does not. I do not wish for my daughter, for the rest of her life, to be known as "the atheist child who hated the Pledge." It is therefore imperative that the Court allow the cause of action to go forward, if at all, without my daughter as a party to this matter through Appellant.

11. I am filing this declaration and accompanying motion to make clear that I do not wish for my daughter to be involved in this matter.

12. Pursuant to 28 U.S.C. §1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 31, 2002.

/s/
Sandra Banning

NOTE:

The first name of the minor child is redacted for purposes of confidentiality.

(Law and Motion Order omitted)

Sandra L. Banning vs. Michael A. Newdow
Reported by Stephanie A. Wagner, Ph.D., December 18, 2001

Recommendations

1. The child's mother, Ms. Banning, to have sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of Banning. Specifically, both parents shall consult with one anther [sic] on substantial decisions relating to the non-emergency major medical care, dental, optometry, psychological and educations needs of . If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of that is not specifically prohibited or is inconsistent with the physical custody order. The father shall have access to all of 's school and medical records.

Redacted

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

HON. JAMES M. MIZE, JUDGE, DEPARTMENT 38

-o0o-

SANDRA L. BANNING, Petitioner,	)	
vs.	)	No. 99FL04312
MICHAEL A. NEWDOW, Respondent.	)	

-o0o-

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

-o0o-

THURSDAY, SEPTEMBER 11, 2003

-o0o-

APPEARANCES:

For the Petitioner:

DIANNE M. FETZER, Attorney at Law
455 University Avenue, Suite 201
Sacramento, California

For the Respondent:

MICHAEL A. NEWDOW,
In Propria Persona

–o0o–

Sunday A. Hicks, CSR No. 6343

THURSDAY, SEPTEMBER 11, 2003

–o0o–

The matter of Sandra L. Banning, petitioner, versus Michael A. Newdow, Respondent, Case Number 99FL04312, came on regularly this day before James M. Mize, Judge of the Superior Court of California, County of Sacramento, sitting in Department 38.

The Petitioner was present represented by Dianne M. Fetzer, Attorney at Law.

The Respondent was present and represented In Propria Persona.

The following proceedings were then had:

* * *

THE COURT: All right. I've got a lot to say, and so I'm going to be spending some time with this. It's going to take at least about an hour. And to the extent an order is going to be made from this or a statement of decision, it's going to have to be from the transcript.

I want to be able to address as many of the things that you all have talked about as possible because in reviewing the case, in reviewing the evidence, it is absolutely clear to me that I find some things correct in what everybody has said and some things just dead wrong in what each and every witness, including the parties, have said. And I want you to know what parts I think are correct and what parts I don't think are correct.

Dr. Newdow, I may be spending just a tad more time with you only because by starting our by saying you're kind of a perfect dad or a great dad, it may be – I may need to be giving you a few more hints at places where you're less than that in order to be able to come through. I think mom has, Mrs. Banning has already admitted on several occasions that she has not done perfectly. Nevertheless, I'm going to point out some more things that I don't think she's done perfectly.

And the problem with all of this is that – and particularly in dealing with it from the standpoint that you have, Dr. Newdow, is by fining fault with something and then holding onto that, it sometimes can make you miss the whole picture because many of the things you told me about the fault that you found with what's been going on with this case I absolutely agree with. And having found all of those faults, the question is what do you do about it? How does one make it right?

And one thing that I've known from years of life, much less years of being a judge, is that most problems can't be solved by saying the other person has to change because there's very little control over the other person. But there is a lot of control that we have over ourselves. And if we can get what we want by modifying our own behavior somewhat, that can be an incredibly positive influence and can make the change that is necessary.

As you know, I am bound by the standard of the best interests of the child, and as a result of that this is not a balancing act as the scales of justice with two parties, dad and mom, on either side. You weigh it and whoever comes out between the two of those is the winner. I've never been able to explain a good analogy for how to get to what amounts to a triangle between a mom and a dad who each have their faults and their abilities and then over here a child who has a totally independent set of needs and requirements that may or may not have anything do with the good and bad qualities of the parents.

Or another way to say that, it is not shocking to the Court if there are situations whereas between two people one parent may

be slightly better than the other and the other parent slightly less good, one may get custody because of other things that are going on in the case. I know that may sound shocking, but other things can be history, can be the relationship between the parties, can be a number of issues that I won't get into.

I want to start by going back to the very beginning, and I want to go back to the very beginning because the very beginning establishes a couple of concepts that if they're allowed to remain unchallenged, if you will, or unargued will affect this case forever. It will never change. And whether this will change will depend upon the party's willingness, not ability but willingness to change.

The very first issue is the, has to do with the concept of whether this baby was intentional or not intentional, whether this baby, – whether there was fault in having the baby, whose fault it was and whether this was a, if you will, a rape or a consensual sex. That seems to me to be very important to the parties because, Dr. Newdow, if in fact this is something that she did to you, then you can justify forever sort of anything you want. It's not your child. You didn't want it, but I'm going to make the best of it and, darn it, she better be good to me as a result of that.

And I think that is incredibly disingenuous on this case to have the conclusion, to come to the conclusion that somehow she forced you into having this baby given all of the circumstances of this case. You had the ability to stop and to leave at any time and not have intercourse. When you have intercourse – rapes are generally with big huge people who come down and beat up little people and force them to be compliant, and I don't see that in this

case. I see that you, for the record, are just every bit as big and as strong and probably bigger and stronger than Ms. Banning is. And if she wanted to have sex with you and you didn't want it, I could have seen you would have easily been able to say I'm sorry, I'm out of here. Goodby. But you didn't do that.

Once you decided to have sex with her, then you accepted all of the responsibilities for this child including the raising of it, including the taking care of it, including all of the ramifications that go with that which includes having to deal with the problems of not getting along with the parents. Not getting along with the parents is, it's not just endemic. It's part of life. You're going to have a child with somebody, and then you're not going to get along with them. You're not going to agree with them about everything that happens in those years that come, and that's part of what you did when you had sex that day. You accepted eighteen years, maybe 30 or 40, who knows when they get married, have kids, move out and come back in again and move back in with you and then their kids move back in with you. So you accept many, many years of this live when you have that sex.

And of all people, you two who are both very intelligent people knew that. Or as we call it in law, you should have known it going in. And as a result of that, if in fact you were to hold to a feeling somewhere in your mind, in the back of you mind that it's her fault that you had the child, nothing will save this relationship. You'll never be able to talk to each other. So that has to be eliminated immediately.

The second part is the first four years. In the first four years you established a pattern of being a visiting father, certainly not a joint custodian by any means by everybody's agreement. You did spend time together. But clearly from all indications and from all the evidence mom, Ms. Banning was the primary custodial parent for those first four years. You even indicated that child doesn't remember that much and as a result of that it wasn't that necessary for me to be there. And the reality is that for children that's simply not the case.

The first four years of a child's life are absolutely incredibly important for bonding with a parent. It's tough to bond with a parent that one might see for three or four days and then not see for eleven or twelve. A child that young needs to have constant touch. And if at the very beginning of this case you were to have accepted this child not only as your own but to the world and to Mrs. Banning and to everybody that this is my child, by golly, and I'm happy to have it, and I want the whole world to know I have this child, and I want to have regular, frequent and continuing contact with this child, we wouldn't be here today on the issue of 50/50 because it probably would be 50/50 if not your getting more if you had other things going for you.

So that there are two things that started this case, that are unmistakable. And that is, one, it took two to tango on that first child having – on having that child [the child], and you're both responsible, you both accepted that responsibility, and the child is both of yours. Second, those first four years established a pattern of noninvolvement that was not a joint custodial relationship.

Now, from Mrs. Banning's standpoint, the fact that somebody does that and then comes back into the picture is not unusual and in fact is fine. I have seen many families where they, people are not involved much for a period of time and for whatever reason they've seen the light about how important it is to be part of a child's life. They get involved. And I've seen people resist. And I always say if a parent wants to be involved, then we're going to let that parent get involved even if they come late in life, even if they come at the age of fifteen. We're going to work it in gradually in order to make sure the child understands what's going on, but we're going to encourage that because that's important.

But by the same token, Dr. Newdow, it doesn't just – it's not a flip of the switch. Children aren't channeled. Children aren't scientific instruments that can be turned on and off. And that once a four year period of time is established where she is the primary custodial parent and then you come into the picture and say okay, now I want 50/50, that's an admirable goal, but it doesn't happen overnight.

Now, you mentioned some things that his whole thing is silly, stupid, ridiculous and, boy I can pick a hundred things about it I would absolutely agree with you. The fact that you've spent hundreds of thousand of dollars on this case is mind-boggling. It's crazy. But I can see that happening as a result of a lot of factors, some of which are beyond your control but some of which were in your control.

And I guess maybe what I want to say by that is people do things themselves. They take certain actions and then sometimes the world works well with them, sometimes it doesn't and that things can snowball. But I want everybody – I wouldn't want anyone to leave here today thinking that somehow or other I put all the burden on everybody else. Because if you leave here today thinking that I think that each of you aren't responsible, then you've missed everything I'm going to say because each of you have some responsibility for making this work.

I would like to make it work. In spite of what you think, Dr. Newdow, about the system and about what it does, at the end of the system there's a judge who truly does want to see kids grow up well and wants to see kids healthy, and we are entrusted with this awesome responsibility of having to take this huge amount of data, filter it somehow and somehow give it back to the people to make them have a good upbringing to the child. It is not an easy task, and it is a task that requires more wisdom then probably any of us have. But we truly do want this to happen.

I would personally as a nonjudge and even as a judge like nothing better than to see the two of you at some point in time down the road be absolutely not the best of friends, you'll probably never be that and that's not going to happen, but be working together so well that [the child] Banning is the star, most secure, most wonderful child in the history of the universe by Parade Magazine and every other objective indicia. And I think it can be done because the one thing you both have is you both have stuff that you can give to this child.

And what's unique about your – maybe it's not unique, maybe it's pretty common, but maybe it's just more pronounced in your relationship – is that each of you supply something and things that the other person just doesn't have a lot of. And as a result of that, together your upbringing with this child can make, can give the child sort of a bigger picture. Not the biggest picture because even two parents can't give the child everything they're going to need to know in the world. But with the two of you together you can give [the child] the kind of upbringing and the kind of things that will be able to make her shine in the years to come.

I want to go over the testimony more or less chronologically, and I'm going to pick out things I'm going to say that are sort of thumbs up or thumbs down on each person's behavior, as well as on my evaluation of the witnesses so that you will absolutely be clear if you want to read it again how I got to my point. You may not agree with how I got there, but at least you're going to know how I got there because you have the right to that. You've given a lot of your time, a lot of your life. You have the right to know how I came to my conclusions.

Penny Hancock was the first to testify, and again some of this is going to be somewhat random so – this wouldn't be the way I would write an opinion, but this is the way it came about so it's going to be this way. She indicated – she had a comment that the child said when it got dark I wanted to go to my mom. And that reflects on the first point that I was saying earlier, and that is that you had said, Dr. Newdow, that if she had just acquiesced at the very beginning and gone with the 50/50 or let me have overnights

immediately everything would have been fine. And that's where you are really missing child development concepts.

This child for better or worse had developed the routine of being with the mom all the time, most of the time and that it wasn't going to be just a flip of a switch. Your coming into the picture was an admirable and positive thing and then – I don't want to over extend. It's not that you were out of the picture, but you're coming more into the picture. I've got to be real careful because I don't want you to take something that I've said and eliminate the thrust of what I'm saying because I'm saying something that is clearly wrong. But you brought yourself more into the picture at this stage. But even then [the child] was uncomfortable with spending the night at the beginning. That needed care, that needed time, and that needed a process of evolution. And that is really the same thing that is going on in this relationship now.

The kinds of things you're asking for, they're not wrong. None of them are wrong. But it's just that these things aren't done by a flip of a switch. They aren't done – clearly they aren't done at least at the stage of best interests with the determination, if you will, of fundamental right that's been violated. Maybe it will. We'll see in the next phase of the case. But given best interests, that's not the way children react. That's not the way that I make decisions. I make decisions based upon what I see to be the benefit to the child and the need to move from wherever they were to the next phase.

You also said something that I absolutely agree with. 2030 of the Family Code absolutely says that the Court – that the parties should have frequent and continuing contact with each other, with the – the child should have frequent and continuing contact with the parents. So that again unlike what, how you have portrayed the Court, this Court actually wants there to be a lot of time with each of you. And the most time of course one can get is fifty percent, and then after that then somebody's getting less than fifty percent. That is not a distasteful concept to the Court. I have made many, many fifty percent orders mand [sic] I've made many, many 80/20's, 90/10's 65/35's. And each of these cases are based upon where the child is and where the parties are in that particular time of their relationship.

She indicated that you had a combative style, and I think that we're going to get to a lot of the things, Dr. Newdow, that are making it more difficult for you to get what you are saying that you want. The analogy I thought of earlier in this is that some of these things you are marching towards and you come to a brick wall that's five feet wide and ten feet high. And you have the choice of climbing over it and going around it but instead you want to go through it. And the reality is there is a way to go around some of these things, some of these problems, these issues and get to the point a lot easier, a lot faster.

And the reason I'm encouraging you to do that, it's not by means of chiding you because you can do whatever you want to do. You can choose whatever you want. But I believe that [the child] would do better if you were to get to your end point quickly and by a smooth method and not by litigious – not litigious but a

combative method where the two of you are fighting all the time. Because in spite of some of the things that I heard here, continued battle at some point is going to affect [the child], if it hasn't already.

I am incredibly delighted that she is so well-adjusted and doing so well now, and it speaks well to what both of you are doing. And I believe both of you as far as what you've been saying about your various ways to help keep her healthy. But I'm not sure it will last forever because someday she's going to be able to understand this a little bit more. And I'm going to point out to you things each of you have done that have been bad already and that if she's doing well it's in spite of the things you have done to her, not because of it. It's because of it and it's in spite of it.

Penny Hancock indicated that east coast/west coast every two weeks was developmentally inappropriate, and I think that – and we're going to come to that later. I agree with her that that would be something that unless both parties were incredibly excited about I think would cause real problems, particularly for a young child who my understanding of the literature tends to need a certain amount of stability.

Now, when we hit the word stability again, Dr. Newdow, you've challenged all the words, and I appreciate that. They should be challenged. And while we may not be able to define each and every thing, I will agree with you on some of the things you agreed were not stability items. But the idea of having a child two weeks in California and two weeks in Florida does go over the line. Just seems very clear. Not a major factor in the case, but I

think at that point indicated a, something you have indicated that tells me someplace where I was wrong. Well, I'm going to try to do that.

You were wrong there. That was not a good proposal, and it may have caused a certain amount of angst and perhaps expenditure of fund whereas someone with a little more understanding and thoughtfulness and attunement, if you will, to a child would have realized this isn't really going to work. That's not really good for a child, particularly considering that we don't get along that well.

All right. Let's do the bathroom. Again, I've heard this one at least six or seven times, and it's very clear. One – let me tell you what the biggest problem with the bathroom. The biggest problem with the bathroom is that, Dr. Newdow, it clouded you ability to see other things because I'm going to say something very clear. As far as I'm concerned on the bathroom incident, you were correct. There was nothing wrong with what you did. And each of the persons' including Mrs. Banning's concern about what you did in the bathroom incident I think are simply wrong.

When you have a child and a girl child and you've got a guy father, those issues are kind of a struggle as you grow with, as the child get older and at each stage depending upon where the bathroom is, who seems to be in there, how the girl seems to be acting at that time are things that you have to decide at that moment. You decided that at the moment, and I think that you decided it appropriately and that I think Mrs. Banning was just wrong for having that feeling that that was a problem.

However, the result should have been I took the – I let her go to the bathroom by myself. Gee, I really don't like that. That's a problem. Really, what don't you like? Well, you should try some other way. Okay, I'll do that. Fine. End of issue. Let's go home. And that's the way it should have been. It didn't. It became a factor and disturbing to me that – not disturbing but unfortunate that that was one of the things that it appeared Dr. Wagner seemed to focus on and that created more focus for you, and eventually the issue became bigger than the little shrub that it was.

It does not indicate negligence, malfeasance, poor parenting or anything. It was a decision you made at that time. There probably could have been other things you could have done and that had another parent been there they might have done it slightly differently, but what you did I found was just fine. So I hope that we don't talk about the bathroom ever again.

I would sort of put more or less in the same category the not holding the child's hand when she's crossing the street and praising her for it. I think I have to start with the idea that, Mrs. Banning, you need to understand and believe what I absolutely will find that Dr. Newdow does not have any interest in having this child get hurt and will not do anything either intentionally to make the risk very high. And that means what you have to do is you've got to let the child go and then go home and grit your teeth, bite your tongue and think about something else, knowing ultimately that he needs the freedom not only to do the things that he wants to do but he also needs the freedom to make mistakes so that he can learn about raising a child the same way you leaned

when you made mistakes in the first few year that you were raising her.

There's no question in my mind that as far as sensitivity to this child that Mrs. Banning has a better feel for the way the child is thinking and feeling. That does not mean that Dr. Newdow has none. Not even a question. These aren't black and white issues. And as soon as somebody walks out of here and makes anything I've said black and white, they are wrong and they are missing my point. But there is no question in my mind that Mrs. Banning has a little better feel for it.

But just as I said that each of you bring to the table things to this child, for this child's benefit that are different from the other, one of the things that Dr. Newdow is bringing to this child is a spontaneity and maybe a little bit of a rick activity that you would never do. Part of that is delightful for a child. Part of that is just something that I think helps a child evolve and develop.

I have no belief whatsoever that Dr. Newdow has any intention to hurt this child or would intentionally put the child in any degree of risk that would be overly problematic. But by the same token, Dr. Newdow, since almost everything I'm going to say goes both ways, you really have to understand that protectiveness by Mrs. Banning is not an indication that she doesn't want you to be with the child. You have to be more understanding and tolerant, but the real world is understanding of the concept that she is not trying to hurt the child, and she is not trying to hurt you either. But she's coming from a place that's very different from you, just as you're coming from a place that's

very different from her.

And just like she has to understand something that she's going to have trouble understanding and that is why should I let this guy do some of these crazy things, you've got to be sensitive to you know what, this thing is something that might make her feel uncomfortable. And even though I have made the assessment that it's got a .002 percent chance of harm and I'm willing to take that harm that's not the point. The point is how does she feel. Address it right to the nub, if you will of this.

The question is not who is objectively correct on all cases. Sometimes objective correctness is very important. But when you're talking about human beings, you move from the realm of science to the realm of interpersonal relations. And interpersonal relations has as an additional factor, the concept of not only being correct but the concept of knowing what the other person feels and thinks and responding sometime to that in deference to what you may feel is correct.

Or another way to say that is if anyone has been married for more than twenty minutes and doesn't understand that sometimes one party or the other has to say you know, I'm right on this. This isn't at all to die on. You say, yes, honey, let's go with you way. Even though the other person may be dead wrong and you may be absolutely right.

The same thing is true in your relationship because you have a child. You don't have a choice. You've got to deal with each other. And as a result of that, the two of you have to come to

ways of understanding that yes, you may be right, but the question of the battle causes more harm that getting your way and getting it the way you want.

I think that the fact that you let the chid cross the street, you were right there, yes, there was probably a .002 percent chance that the child would have run out, but I'm willing to believe that would you not have allowed that to happen if you though that was a possibility. And as a result of that, I thought that it was a nice day for her. There may be other days I would hope you would have held her hand regardless of whether she wanted to or not because it was just too dangerous or too many other things were going on. I believe you would have the ability to make that judgment call.

I think that we're talking about ultimately, you know, the issue, Ms. Banning, about co-parent counseling here and I think that had co-parent counseling happened in this case some years ago when this thing first started you could not have only saved $300,000 but you could probaly be at a place where both parties would be much happier now than what's going on. Instead another route was taken, and I'm going to leave that.

I found that Stephanie, Dr. Wagner's – I found problems with every expert, so none of them are going to pass through the gauntlet without some scars. I think she over emphasized that incident. I thing she over emphasized the injury incident on the fan. Children are going to get injured. Children are going to het hurt just in living. And unless you put them in a closet and put a cage around them, they're going to get hit by things, they're going

to trip and fall and sometimes they're going to get seriously hurt.

Again, I think we have to start with the concept of that in and of itself did not indicate to me bad parenting. That indicated something that happened that presumably Dr. Newdow corrected. And Dr. Wagner's focus on those incidents just did not make a lot of sense to me. And here we come back to the idea that you're right on these things about your analysis, but that doesn't – but there are other things in the case that aren't focused on. And many of the things you focussed [sic] on are the things about the other side's argument as opposed to some of the things that are correct and that has I think prevented you from being able to get to the next step of actually doing something about these.

Walking on the iron beam without hold her hand, you know, I have to go with Dr. Newdow on that one again. If he felt that this was dangerous and did not care and felt that there was a real potential injury to happen, I just can't believe he would have done it. He was there underneath standing and there is – again, I think you have to start with the idea either the person's going to be risking this child's life or the person is not. And I think with respect to these items, I don't think that that was a significant problem.

However, again, same issue. The issues that comes up over and over again is not the objective evaluation of the item but the party's response to it. If you had heard what Mrs. Banning said about how she felt about that, the response of an appropriate co-parent is hey, I'm really sorry. I will never do that again, I promise you, and mean it. Don't ever do it again. Why? Not

because objectively it might be over the risk level but because co-parents have to do that.

It is important that if that is too much, if that goes too far beyond her leave – and I will also say that Mrs. Banning's belief that it is dangerous is absolutely reasonable. Absolutely reasonable. And if she were to say – if the child were to say to her I want to do that and she would have said no, absolutely not do that. Well, my dad let me to that. No, you will never do that. I would say she's being an absolutely perfect parent at that time because she has to make that call at that time. So she can be right doing that.

And the only thing I'm concerned about is the interpersonal relationships out of it. What does it take to do to make that work? You have to be able to talk to Ms. Banning and hear what she says and say you're right, I won't do that again. Because that cannot have been something of such importance that you wanted to do that over and over again. At least you did put her in a gym glass [sic] where there's appropriate padding and all the stuff to do that.

So you might have been correct on that time, but it's the response to that, the battle that ensues as a result of that that is a fault, that is a problem, that creates the difficulty with the child. Dr. Wagner was correct in indicating that parenting classes are appropriate for dysfunctional family relations.

The roof incident, from what I understand of the roof incident it was something that he did, took her on the roof when he

was there, when he felt it was safe and absolutely prohibits her from doing it herself. And if she did it herself, it was against his views. And again, I don't know how steeply pitched the roof is. But if it were not a perfectly pitched roof and I felt to go out on it and be safe, that's nothing for him to decide.

Back again, then when you heard Ms. Banning didn't like it, your response would have been immediately, okay, not a problem. I'll make sure it never happens again. I think that kind of may have happened, but anyway that's the appropriate response for a parent because that's the thing – whether you're right or wrong isn't the issue. It's the issue of the ability of being able to hear a human being and be able to respond to that because your job at this point is to make Mrs. Banning confident and feel more comfortable that you will not subject the child to unnecessary risks.

I've just told you I thought some of the things you've done may have been just fine. But I'm not married to you nor did I have the child with you. Ms. Banning did. I'm saying also her concerns are absolutely reasonable and appropriate. So, therefore, while you may be technically correct in some objective sense – and I'm trying to give you that so you will understand what I'm trying to say – co-parenting requires a sensitivity to her objection to it and to be able to respond to that appropriately and say okay, it will never happen. Not going to do it.

MR. NEWDOW: Are we allowed to ask questions?

THE COURT: Not yet. About the car incident, the child in the back seat of the car with the seat and all. Here's one I'm going to be totally reversed. That one, Dr. Newdow, you were dead wrong on that one. That one is not a question of percentages. There is so much indication that if a person is – if a child is riding in the car that it's safer in the back seat, and you're going to Mrs. Banning and saying oh, no, I've done some research and it is safer to be – it is not that much more if any more dangerous to be in the front seat is so much, it's so off base missing the point and that is that it is a real concern for Mrs. Banning and has some objective relief in that populous.

And to the extent you may be technically correct about the number of people that have died is so far the reality of the ability to co-parent that it clearly indicates the kind of thing I would want you to work on in co-parenting. And that is that just the objective correctness of a particular thing having to do with a car seat is not the point there is a world of information and belief out there that something is wrong, then that isn't the hill you want to die on and you want to develop co-parenting skills. It would be you want the child in the back seat? No problem. The child's going to be in the back seat. I love this child. I want you to be comfortable with me having the child.

You've got to convince her by my standard so to know it's not impossible, my standard that you've done everything you could do to convince her, that in fact you're taking steps to make sure this child's safe, health and everything else. And that's something again you were wrong to have done that, just objectively, emotionally and interpersonally involved. I think on

that particular incident it just indicates in a sense a desire more to be correct that it does to have, to get your goal and the goal would be you would have a nice time relationship with the child and to battle with the mother about something.

Oh, having friends over. I may have indicated that in my question. It seems to me that the father having a friend over is not at all a problem or an indication that he doesn't want to spend time with the child. I think that just commands the universe for the child. The father has the opportunity to be able to nurture the child, then to teach the child proper manners and customs and relationships with another child and is more able, is more sensitive than to be able to see whether the child is getting arrogant or bossy with her friend and can nip it right there. If no children are ever over, then he can't see that interplay, and as a result of that there's nothing problematic with that.

Let's talk about the pledge case for a minute. Dr. Newdow, something that you said just absolutely puzzles me, and it just makes no sense, and I need you to hear this. To blane [sic] Mrs. Banning for the impact of this case on [the child] is really disingenuous. She would not have been going around the country, as you put it, publicizing her name had this child not been in the middle of a very, very significant case and named as a party in a very significant.

To be able to say that nobody would have been able to know who she was or what she was bout or how to find her is so wholly disingenuous. An investigator with twenty minutes of experience would have been able to trace her to Elk Grove, to this

school that fast and find her and be able to get to her name, long before Ms. Banning said anything about what's going on in this case.

I granted the order to have you go to the Ninth Circuit, and I still believe that was an appropriate order. I thought that was something good for a child to do, to see a parent in a setting like that. But to have included this child in this action without clearing it with a joint custodian who has a real interest in making sure the child is safe clearly it's something that at that point, what I would see you doing is say look, I'm not really sure about that. I would not have done this without hearing if from you or you, too because in all circumstances you had testified there was risk. There might even be health issues involved.. It could have been a massive suit with all the emotion in it. And to have your child be put into some kind of situation where she could be injured and not have the mother be 100 percent behind it is just conscionable parenting at that time.

And I think I've used this analogy before. If any of the children who were breaking the color barriers in the south, in the 50's and early 60's, these kids all had the total support of both of their parents. But if any of them had come in to see me, and one of them said my child can tolerating the spitting on them, the anger towards them, all the other things that are going to happen, then I would – and it was a joint custodial relationship, I would have said that's not going to happen because that's the kind of call on something that important, that something that both parties have to get joinded [sic] on and both parties have to agree upon.

So some of the judgment calls you make with respect to the pledge case and having your child there really indicates again in an inability to co-parent, to be able to talk. That's something that has to be dealt with. Remember, no matter how nice the deal may be, no matter how appropriate or how direct it may be, but this isn't an issue at the present time of the correctness of the pledge case. It's the question about co-parenting and the ability to be able to talk to each other.

The pioneer plant incident and the correcting of grammar is another real factor in I.Q. I guess. And let me tell you what I mean by I.Q., possible maybe unlimited numbers of intelligence quotients. Some people are skilled talent intelligence when it comes to music ability. Others are good at verbal and scientific. Others are good to make good judgment calls. And it is fairly clear that you are both above average on both scales, on both cases.

Dr. Newdow is probably slightly more elevated on verbal mouth skills and it is also clear that Mrs. Banning is more elevated on the question of social emotional interchange and understanding. If you understood that, then the corrections on these things, certain kinds of corrections whether you are right or wrong are inappropriate to be made and are bad for Mrs. Banning. They're bad for [the child]. And the focus on these kinds of things does nothing but demean and intimidate and does not do anything for creating good trusting relationships.

I got here at one point, Mrs. Banning, you washed the child's mouth out with soap. And I'm glad that didn't come in to

see me because that is something that would have been very positive in this Court. If I had heard that you had done that and that were a recent incident, I certainly hope you would never think about doing something like that again. That's something that may have been in another era, another day, but we don't do that to children nowadays. There are many better ways to do it. I felt that was wholly inappropriate

As indicated before, it's the judge's job not to accept everything that everybody says but to be able to analyze them, and that's why you're getting both the positive and negatives on everything.

I found Mrs. Banning on direct and on cross-examination to be incredibly centered, balanced, understanding, very sensitive to the needs of this child and more than probably anything else I found her to be more likely to understand my question about would you ever stop this whole process and give up and just give him what he wants because of the pain or the injury it might cause her, cause [the child]?

On several occasions where she did something wrong – another thing where Mrs. Banning did something wrong was the crying on the door steps. Totally agree with you, it happens all the time. As long a both parents are there's wailing, and the child is prepared. Normally we take care of our child together. That avoids that problem. But it's clear that that was happening. But again both of you needed to adjust to this. You needed to know it was okay to leave and not to make a big scene. You needed to know that this was a new process, not just for [the child] but for

Mrs. Banning, and you have to be sensitive to that.

What I like about Mrs. Banning's testimony she said she hear – basically, this, I guess it was from Mrs. Hancock, and she changed. She adjusted. That's what I mean, the ability to say I'm wrong and I'm moving froward. One of the awkward things I'm doing right now if you pick [the child]'s life as a parent, there's nobody in creation who can get the negative analytical scolding that I may be doing here because everybody's made mistakes and so that this is just – what I'm looking for is not whether somebody makes a mistake but what things are they doing the to make up for it.

On these days you may have did things Ms. Banning wouldn't like. What do you do with her time? Did you say this is my child and this is my relationship? And you have to be sensitive to the other people. When you took the child to the hospital, you should have called. You should have called the first change you had. The issue is not whether you were taking care of that child well. The issue is another parent of this child who loves this child just as much as you do would want to know. You should have done that. By not doing that was wrong.

When he let his child go to school without her splint you need to be more cognizant of the fact this is a doctor who loves his kid and would not instruct the child to harm the child. Dr. Newdow, you need to understand that she got an opinion from some other people that it wasn't supposed to happen and it would have been risky. So all of those things that happened had real communication between the two of you because you are both right

and you are both wrong at different stages of the proceeding. And I need you to talk about it and say look, I'm going to let the child to this. I'm really sorry. I didn't mean to upset you. I understand you got that sense. Gee, I'm sorry. But I made the decision to do this, and I'll try to be more understanding in the future. When you hear from him that yes, independently as a physician I understand it's going to be okay for her and afer this all out of five weeks she would have the benefit of doing more things like swimming than without the splint on it. You've got to give him the benefit of the doubt to know that that's okay, that he's okay with it.

The thing that's nice about you two that neither of you – that both of you love this child, and both of you are going to be just by being where you are, the pattern you've gotten at.

You mentioned the word data a lot, and data is an important issue to you, Dr. Newdow. The comment I would make, you've got a lot of data, but everything you've been doing so far hasn't worked and you need to try something else. I'm going to try something else given the data you have. And not only that, I'm going to tell you it will work. And if it doesn't work, you'll come in here with a different set of arguments that could be more persuasive to the Court. And if you did everything I said and Mrs. Banning can't change custody with you, then I might change custody and see how you can handle it.

I don't believe you've been a parent in the past, and as you sit here today with the attitude you have in this case and courtroom, you are not able to co-parent now. It's really clear.

Dr. Kaufman had a lot of problems, and while I though he was – he drew some conclusions that were simply inconsistant with his other observations, musings, whatever you want to call them. He's a doctor. When he writes something down he doesn't write it down as though he has no meaning whatsoever. He found Dr. Newdow to have problems with co-parenting. To be – he said that – oh, I found Dr. Kaufman, too, to being a little obsessively evasive and certainly inconsistent at times so that what he was trying to say got lost in, if you will, the data that supports it.

There was very little data that supported his concept and quite a bit of data that supported his statements that this is clearly a case of sole custody and that nothing else is going to be able to work on these parties until they get more attuned. And you made a number of comments in his first notes that are consistent with what basically most of the other psychologists have said, and that is the concept of egocentric and narcissism, and I'll get the rest of the list. And while that list sounds kind of nasty, it's not psychotic. It's just a standard neuroses under the circumstances and it need to be addressed for any of this to work. I found Ms. Banning to be very senstivie [sic], very intelligent and very logical in dealing with her child.

There was a comment that Dr. Newdow made regarding child support and funding, to know where the money was being spent, and that's just outrageous. You should never have done that. It's the child's money.

In addition, if there was any incident from the brother which theoretically that always happens under the law, that's not

unreasonable because of the need to equally parent, the ability to take care of a child. But there should have been something inside that say, gee, this is working. I don't want to say anything to her because it makes her feel like a small parent. If that felt fine, then that's what you're operating on.

I'm skipping some of the things, but I'm hoping you end up getting the concept. If each of you want to comment of all the evidence one way or another I can listen to you, but obviously I'm going to be gone. At least it causes both of you to rethink when you believe you might have been right on some of these big things. If [the child] said to dad you're making us leave the house, that was a terrible thing to make [the child] think that that was happening. Should have never happened. Bad parent. Bad parent.

I thought that Dr. Nicholas' comments about Dr. Kaufman's report for the most part were an accurate assessment of the items that make up a good report and accurate criticism of some of the things that he said. I also disagreed with some of the things he said, and in an interest of time I'm not going to address all of them. There were a couple of results that he came to. And I'd be happy to elaborate on that further if either of you want me to at a later date in an attempt to make a more full statement of decision regarding each of these incidents. Yeah, there are sixteen other incidents the that the two of you argued over.

He also recommended co-parenting. Dr. Kaufman recommended co-parenting. I think Dr. Wagner may or may not have recommended co-parenting. But I think all of those are absolutely right on. Neither party had indicated anything about the

other side bad in front of [the child], but both of you acted in a way that makes if very clear to [the child] that you have less than the full amount of positive feelings for the child, and the child has already picked up some of that and will pick up more as time goes on. So it's not all rosy. As long as the two of you have the feelings you have for each other as you do now, it's going to get worse.

Fortunately, some of these things I've actually talked about already. One of the things that really concerned me, Dr. Newdow, about your testimony is the statement by you that my life is ruined as a result of having less than 50/50, that it's ruined my relationship with my child. That's a little bit scary because it seems to me that, number one, the concern at least in this Court is not whether your life is ruined or not – I'm sorry. That goes back to maybe a basic fundamental disagreement I have, but I'm concerned about the child's future. If in fact you feel that way, that's going to affect the child and that's what I don't want to happen. And if that's the case, the issue is not about anything other than what's going on in your head as to how you are perceiving it and what you may be transmitting to the child.

When you said you could not trust her ever, meaning Mrs. Banning, there are ways of co-parenting where you don't have to like somebody or think they're wonderful but you can still achieve some level of acceptance of how they're going to respond or act. You can call it trust if you will, but there are ways in which you can do that, and co-parenting can help teach that if you arewilling [sic] to learn.

I think Mrs. Banning's emphasis upon the warm fuzzies is important, and I think that warm fuzzies go long way to help a child get from one stage in life to another. I think one of the summary things that I think I've already made clear, that is that the job of a good parent is to be able to not only do what's right for the child but also to be able to respond to the feelings of the other parent and that I can tell you there are probably tens of millions of cases where parents in this world have been right on some technical or academic point but had nevertheless foregone the fight in order to be able to save a child and keep a child from being in litigation.

These are people who will never get into the newspapers. They're never going to get into any case law, but they are in fact the true heroes of this world because for no thanks being given, no thanks – even sometimes maybe no thanks from the child but they have been able to develop a period of time where a child had a more safe, nonlitigious upbringing, not battled upbringing and were able to do that in a way that made them grow up to be good strong citizens. They are my heroes. They're the ones I'm always looking for in my court.

It's easy to find people come in and say this is what I want. If I don't get it, then the other side is wrong. I've seen a lot of people say this is what I want – I don't see it, but this is it, I'm going to get his wallet and I'm not going to let it go. I'm always looking for those heroes. I'm always looking for those brave souls, they're courageous souls. They're hard to find because it becomes so personal and it's almost as if you're getting something cut out of yourself. That's why they call us grown-ups, they call

us parents. We're supposed to be able to make those loving decisions for our children that we don't get anything out of it but only has to do with what the child gets out of it.

A couple of times you've indicated, Dr. Newdow, that Sandy was wrong. You used the term on that. And maybe about half half the time I agreed with you and on the other half I think you were wrong. I needed to point out things where you made mistakes, where you were not a good parent to [the child] and I hope I've made some. If not, there are some I could go through if you want to try to spend the time, but I want to try to end this now because we've already taken a lot of time. But it's there, and objectively it's as clear as can be.

I don't know that I even needed another more current evaluation, even though certainly I appreciate it would have been nice to have somebody who was qualified in the area of doing 730, giving you something that's really detailed and recent. But I didn't think it would change any right now. I think I got a really clear picture of how you two are operating right now and how you should go.

Let me tell you what I'm going to do, but I am going to make a couple of changes now. I'm not going to grant 50/50 which is, I know, Dr. Newdow, what you wanted. I don't think that's appropriate at all yet because it can't happen until the two of you start being able to communicate on a level that's different from what you're doing right now. It's not, I'm right. If she stops fighting me everything will be fine. That's not going to happen. Not that she won't stop fighting. She may give you 50/50 some

day on her own, but if she does it's not going to necessarily stop the battle because the two of you have to develop ways of resolving all your other conflicts.

What I saw is a couple of things. I wanted to see a number – I wanted to see long weekends, and then I was struck with the problem of Sunday night church. And I struggled with that, so I'm going to give Ms. Banning a choice in this. First of all, the child is developing now and is old enough now. Everything I've heard from this child seems to me she's capable – certainly not only capable but it would be helpful for her to spend some more time with her father. I'm going to order more time, and this is how I'm going to do it.

I would like to her to have a long weekend. I'm going to let the mother choose. She can have a Friday to Monday morning or Thursday to Sunday night, and that way we can do that because I don't want to influence but I think it's time for her father to have a little bit more.

I'm going to increase – there is – right now I understand there is a three four-week intercessions; is that correct.

MR. NEWDOW: Yes.

THE COURT: I want to see that – immediately I want that to change two weeks/two weeks. So I want that to be split 50/50.

MS. FETZER: Alternate week on/week off?

THE COURT: The parties can – I want you to talk about that. You may want one week/one week, one week/one week. You many want two weeks at a time straight. I don't really care. If you want to decide that, I don't care. I just want you to split it evenly.

I want you to engage in co-parenting classes immediately, and then six month from now if those co-parenting classes are going and seem to be having any kind of success, then I want those off sessions to be slightly modified one more time to give the father three weeks of the four weeks for two of the sessions with mother still having two weeks and them - -but of the three weeks of since father's going to have the three weeks I want mother to be able to chose which week she gets. Or she can split it up and have a couple of days at the beginning or a couple days at the end. Plus one of the four week sessions she gets a full two weeks vacation time, wherever it is.

Basically what I'm doing, I'm not changing essentially the custody time during the school week because I think there's been a pattern of success that I don't want to influence, but it also is appropriate for the father to be able to have a little bit more time. And this is not uncommon to give the father or noncustodial parent more time during the summer months and the mother more time the school year.

With respect to phone calls, it seems that there should be maybe some – it shouldn't be phone calls everyday. The child's old enough now to be away from the parents a couple of days. The child can call whenever she wants always, but it seems to me the

calls should be maybe every two or three days and do that during the period. Maybe in the period of where the father has the weekends, maybe one call. Not three.

Now, if the two of you want to decide they want to have daily calls, that's fine. Anything you want to decide that's different from what I do is just fine with me. These are minor matters, but the child's getting old enough to be able to tolerate that. Otherwise the holidays and the other things can go as they used to be.

What I'm looking from is this and, Dr. Newdow, I'm addressing this to you, I would like to see – this is a good parenting plan for right now. If you want it to be different from this, then it's up to both of you to show me the ability to be able to co-parent, which doesn't mean the other side changing. It means you are being able to figure out what makes the other side tick and to be able to respond to that human emotion and those feelings and concerns of the other side. When you can do that, then you can have the I.Q. that's on the emotional social standards that's as high as the verbal math skills, and when do you that it will be better for [the child]. And I hope it happens some day, but if it doesn't this is the order.

Any questions?

MS. FETZER: Yes, Your Honor. On the six months from now where it goes to the other, how – you said that was if the parenting classes or co-parenting classes are going well.

THE COURT: I want at least three or four months of co-parenting classes to be engaged in by that time. And I would like to be able to have some kind of –

MS. FETZER: Should we have a return date?

THE COURT: Yeah. We can have a return date for that.

MS. FETZER: That way you can take a look at that and see.

THE COURT: We can have a return date in six months.

MS. FETZER: Unless we feel it's going fine and we can mutually agree.

THE COURT: Unless you feel it's going fine and can mutually agree.

MS. FETZER: As far as the other schedule as far as whether it's Friday through Monday or Thursday, can I talk to my client.

THE COURT: Yes. I would prefer it be Friday to Monday, the more traditional one. I understand the child goes to Church on Wednesday, too, but I don't want to get too deeply in that right now.

MR. NEWDOW: That's every weekend, right?

THE COURT: Well, the first, third and fifth.

MR. NEWDOW: So she still gets to take her to church the other weekends no matter what.

THE COURT: Correct. And that's why I'm saying I'm suggesting it be Friday to Monday. I think that's a more traditional schedule, and it probably will eliminate more fights between the parties, and if there's a real problem I may just say that. So I'd like you to agree to that.

MS. FETZER: Okay. I'll talk to her about it.

MR. NEWDOW: Two other things. One is I never to homework with her. Her homework's during the week.

THE COURT: You're going to do homework now, lots of homework because the weekends are – the weekends are a massive times coming up for projects, which I think is just exactly up you alley. Make a big project of going out and gathering pieces of hay and putting them in the book and taking it, I think you'd be absolutley wonderful about that.

MR. NEWDOW: How about like math and –

THE COURT: You'll be good about that, too. Whatever homework is due on the weekend, you're going to have to have it done by Monday morning.

MR. NEWDOW: I don't know, has she had any homework on the weekends.

THE COURT: Don't worry about it. It's going to come.

MR. NEWDOW: And then the legal custody, do I have legal custody?

THE COURT: It's going to be joint legal custody. I think it's time for that to change, just emotionally for no other reason. There's no reason why Dr. Newdow should not have a major say in the education and health decisions. However, I'm going to create the same thing.

Until I get some more response regarding the concept of co-parenting abilities, to the extent that you get to the point where you've discussed these matters which you're required to do, unless they are emergencies and there is no agreement, then mom is going to make the decision on it. I would like to change that the moment I get to the point where I feel that both of you can truly come to decisions where you're giving up on some valuable things, things you think are valuable in return for the welfare of the child. When I see that happening, the I think co-parenting can come.

MR. NEWDOW: I'm confused.

THE COURT: And not just her.

MR. NEWDOW: So do we have joint legal custody?

THE COURT: You have joint legal custody as of right now.

MR. NEWDOW: Okay. But she still makes –

THE COURT: She makes the final decisions if the two of you disagree.

MR. NEWDOW: And why is that? Just out of curiosity.

THE COURT: Because of everything I've said already. It's not appropriate yet for the two of you to be co-parents because of all the things I've said. There are too many things, examples of clear problems.

Anything else Ms. Fetzer?

MS. FETZER: No. Should I just notify the Court as to – I guess I could do that in an order with statement of decision – as to which way mom wants to go on that.

THE COURT: Yes. Well, you can do that or, better yet, talk it over with Dr. Newdow.

MS. FETZER: I did plan on doing that as well, Your Honor.

THE COURT: And put that in a statement of decision. If there's a problem, anything else that needs to be addressed, set up the statement of decision for a hearing, tell Di, and she'll put

together a date for us to discuss that and tell me whether you need twenty minutes or you need two hours or more than that.

MS. FETZER: You Honor, so this is not in any way considered a final order under Montenegro, is that correct, or are you going to consider this a final order.

THE COURT: Do you understand what that means?

MR. NEWDOW: I assume it's something to do with availability.

THE COURT: It had nothing to do with availability. I'm gong to avoid that issue for a moment, but I will consider that a little bit later. I will tell you, frankly, I'm not sure that there's anything else I could know about this case as far as what's happening right now.

MS. FETZER: That's why I was asking.

THE COURT: I understand.

THE CLERK: Are you going to set it, Judge, into March? Are we setting it on our calendar?

THE COURT: Yes. You can do that with Di.

MS. FETZER: Also, Your Honor, we need to set the hearings for the attorney's fees issues that before the Court.

THE COURT: You can do that with Di. Clear a date with Dr. Newdow, and we can hear that later.

MR. NEWDOW: Two things. One in relation to that as the Court knows –

THE COURT: Do we need to be on the record for this?

MR. NEWDOW: No.

THE COURT: Okay.

(Whereupon the proceedings were concluded.)

–oOo–

CERTIFICATE OF OFFICIAL SHORTHAND REPORTER

State of California)
) ss.
County of Sacramento)

I, Sunday A. Hicks, hereby certify that I am a Certified Shorthand Reporter and that I recorded verbatim in stenographic writing the proceedings had Thursday, September 11, 2003, in the matter of the Sandra L. Banning, Petitioner versus Michael A. Newdow, Respondent, Case Number 99FL04312, completely and correctly to the best of my ability; that I have caused said stenographic notes to be transcribed into typewriting, and the foregoing 1 through 42 pages constitutes a complete and accurate

transcript of said stenographic notes taken at the above-mentioned proceedings.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Dated: September 19, 2003

COPY

Sunday A. Hicks, CSR No. 6343

–oOo–

STEPHAN W. PARRISH, Bar No. 82620
FOLEY & LARDNER
Attorneys at Law
One Maritime Plaza, Sixth Floor
San Francisco, California 94111-3404
Telephone: (415) 434-4484
Facsimile: (415) 434-4507

Attorneys for Intervenor Sandra Banning

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE REVEREND DR. MICHAEL A. NEWDOW	)	No. 00-16423
Plaintiff-Appellant,	)	
v.	)	District Court No. 00-0495 (E.D. Calif., Sacramento)
THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.	)	
Defendants-Appellees.	)	

SUPPLEMENTAL DECLARATION OF SANDRA BANNING IN REPLY TO PLAINTIFF-APPELLANT'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE, OR ALTERNATIVELY, TO DISMISS THE COMPLAINT

I, Sandra Banning, declare as follows:

1. On August 5, 2002, I filed a motion for leave to intervene, or alternatively, to dismiss the complaint. This supplemental declaration is submitted to the Court in reply to the opposition to my motion filed by plaintiff-appellant, Michael A. Newdow (hereinafter "the Appellant"), on September 27, 2002.

2. I am informed and believe that the Appellant obtained two extensions of time from the Court in which to file his opposition to the motion for leave to intervene, primarily on the grounds that he had filed a motion for change of custody with respect to our minor child which, if granted, would render moot my motion for leave to intervene.

3. The Appellant's motion for change of sole legal custody of our minor child was heard by the Superior Court of the State of California, County of Sacramento, on August 21, 2002, in Case No. 99FL04312. At the conclusion of that hearing, which I attended, Judge Mize did not modify the existing custody order, under which I have sole legal custody of our minor child. A further hearing was held on September 17, 2002, before Judge Mize. The only reason for that hearing was to decide whether the Appellant had the right to represent our minor child directly or

indirectly as her "next friend" in the matter now pending before this court. At that hearing, Judge Mize made the following ruling:

a. As there was enough evidence of potential harm to our minor child, and because I did not agree that she should be a party, the Court ordered that the Appellant could not represent our minor child as a party or as an unnamed party in his Federal lawsuit concerning the "Pledge of Allegiance," that she was not to be a part of the lawsuit, and that I had the right to say that our minor child should not be a part of the lawsuit.

At that time, the Appellant referred Judge Mize to a Supreme Court decision that he felt would affect the Court's decision. Judge Mize stated that his ruling was temporary until he had a chance to consider that case. On September 25, 2002, after further consideration, Judge Mize affirmed his ruling, which is summarized above, and, in addition, ordered that Appellant to pay my attorney's fees in the amount of $12,000.

4. I have been informed that the Appellant contends that the declaration that I filed with this Court on August 5, 2002, in support of my motion for leave to intervene, contained allegations that he characterizes as "patently false." He specifically refers to the statement in my declaration that I was only "vaguely aware" that the Appellant had challenged the legality of the Pledge of Allegiance. I also stated in my declaration that I was not aware that the Appellant had filed the underlying cause of action based, at least in part, upon the claim that he was my daughter's "next friend." (See, Declaration of Sandra Banning In Support of Motion for Leave to Intervene, filed

Aug. 5, 2002, ¶ 5.)

5. In stating that I was only "vaguely aware" that the Appellant had challenged the legality of the Pledge of Allegiance, I was referring to the action pending in the United States District Court, Eastern District of California, and to the proceeding in this court.

6. I was aware of the Appellant's earlier attempts to bring his claims in the federal courts in the State of Florida, that he was concerned that those claims might be dismissed because our minor child did not attend school in the State of Florida, and that he had indicated that he might have to initiate such litigation in the State of California, if the litigation pending in Florida was dismissed.

7. In November 1999, I did attend a meeting attended by the Appellant with the principal and kindergarten teacher at our minor child's school in Elk Grove, California. This meeting was requested by Appellant and concerned his desire that our minor child be assigned some type of task when the Pledge of Allegiance was recited at school. I objected to that request because it would have resulted in our minor child being singled out from her other classmates, and because I did not object to her reciting the Pledge of Allegiance.

8. Prior to the decision of this Court filed on June 26, 2002, I had never read any papers or briefs from this case, including while it was pending before the United States District Court, Eastern District of California. I did not know that the case

had been dismissed by that District Court, or the reasons for the dismissal. I also had no knowledge that the Appellant was claiming to represent our minor child as her "next friend" or that he was prosecuting this litigation on her behalf. I had no knowledge that he had claimed that our minor child had been harmed by reciting the Pledge of Allegiance, or that he was claiming that she had been coerced to recite the Pledge of Allegiance.

9. The first time that I became aware that the Appellant had litigation pending in the U.S. Court of Appeals for the Ninth Circuit was when he asked permission to alter the visitation schedule to bring our minor child to the oral argument that was to be held before this Court in March 2002. I was not aware of the significance of the oral argument proceeding, I was not aware of why the case was pending before this Court (because I was not aware of what had occurred while the case was pending in the United States District Court, Eastern District of California, or that the case had been dismissed at that level), and I was not aware that our minor child was involved in the proceeding as a party, named or unnamed, or that she was being represented by the Appellant as her "next friend."

10. The Appellant does not dispute my statement that I was not aware that he had filed the underlying cause of action based, at least in part, upon the claim that he was my daughter's "next friend."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 3, 2002, at Sacramento, California.

/s/
Sandra Banning

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff-Appellant,

v. No. 00-16423

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH, * President of the United States; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, Superintendent EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, Superintendent SCUSD,
Defendants-Appellees.

D.C. No. CV-00-00495 MLS/PAN

ORDER

Filed December 4, 2002

Before: Alfred T. Goodwin, Stephen Reinhardt and Ferdinand F. Fernandez, Circuit Judges.

Order by Judge Goodwin;
Concurrence by Judge Fernandez.

* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

ORDER

GOODWIN, Circuit Judge:

After we issued our June 26, 2002 opinion in this case, Sandra Banning, the mother of Michael Newdow's daughter, filed a motion for leave to intervene, in order to, *inter alia*, challenge Newdow's standing to maintain this action. Banning attached to her motion as an exhibit a copy of a February 6, 2002 California Superior Court custody order. That order awarded Banning "sole legal custody" of the child. We have carefully reconsidered the question of Newdow's Article III standing in light of this custody order and affirm our holding that he has standing as a parent to continue to pursue his claim in federal court.

I. FACTUAL AND PROCEDURAL BACKGROUND

When this case first reached us from the district court, no legal custody question or order had been disclosed to the federal courts. Newdow had alleged in the district court that he was the father, and had custody of the minor child. The record now indicates that Newdow and Banning formed a family consisting of an unmarried man, an unmarried woman, and their biological minor child, who lived together part of the time and lived in separate homes in Florida and California, from time to time, with informal visiting arrangements. This informal arrangement apparently was not subject to any custody order until February 6, 2002, after Newdow

had appealed from the dismissal of the action he had commenced in federal district court to challenge on Establishment Clause grounds the practice of reciting the pledge of allegiance in the public elementary school his child attends.

On February 6, the California Superior Court entered an order containing the following language:

> The child's mother, Ms. Banning, to have *sole legal* custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs of [the child]. If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records.

Thereafter, Newdow, alleging "changed circumstances," filed a motion in the Superior Court for a modification of the custody order, seeking, *inter alia*, joint legal custody with Banning of their child.

On September 25, 2002, the Superior Court (Judge Mize) entered an *in personam* order enjoining Newdow from pleading his

daughter as an unnamed party or representing her as a "next friend" in this lawsuit. The United States promptly filed a motion, which we have granted, to enlarge the record to include the state court transcript of the September 25 hearing before Judge Mize. That transcript contemplates a full trial in the future on Newdow's motion for modification of the February 6 custody order.

Judge Mize appropriately reserved to this court, however, the question of Newdow's Article III standing in federal court. Newdow no longer claims to represent his child, but asserts that he retains standing in his own right as a parent to challenge alleged unconstitutional state action affecting his child while she attends public school in the Elk Grove Unified School District (EGUSD).

II. DISCUSSION

Our original opinion in this case holds that a parent has Article III standing to challenge on Establishment Clause grounds state action affecting his child in public school. See Newdow v. U.S. Congress, 292 F.3d 597, 602 (9th Cir. 2002) (citing *Doe v. Madison Sch. Dist.* No. 321, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) and *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985)). Banning's motion for leave to intervene presents a question of first impression in this Circuit which we are required to consider, even though raised for the first time on appeal. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("The jurisdictional issue of standing can be raised at any time."). Does the grant of sole legal custody to Banning deprive Newdow, as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child?

A Seventh Circuit decision, *Navin v. Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001) (per curiam), addresses a noncustodial parent's standing to challenge a school's educational plan for his disabled child under the Individuals with Disabilities Education Act (IDEA). Though not controlling, the Seventh Circuit's reasoning in *Navin* illustrates a useful method of analysis for the standing question presented here. The divorce decree in that case had granted the mother sole legal custody of her son. The Illinois Marriage and Dissolution of Marriage Act provided that the legal custodian may determine, absent an agreement by the parties to the contrary, "the child's uprising, including but not limited to, his education, health care and religious training." *See* 750 IL CH § 5/608(a). Contending that tutoring for his dyslexic son was being provided by a "crossing guard supervisor with no skill (or at least no certification) in educating dyslexic youths," the father in *Navin* had asked for an administrative hearing under the IDEA and filed suit in federal court when the hearing officer terminated the proceeding without addressing the merits. 270 F.3d at 1148. The district court dismissed the father's suit, holding that as a noncustodial parent, he had no standing to challenge action affecting his child in school. *Id.*

The Seventh Circuit held, however, that noncustodial parents do not automatically lack standing under the IDEA. 270 F.3d at 1149. Instead, the court of appeals explained that whether the noncustodial father in *Navin* had standing depended on the parental rights granted or reserved to him in the divorce decree in light of the mother's assertion of her rights so granted or reserved:

> If the decree had wiped out all of [the noncustodial father's] parental rights, it would have left him with no claim under the IDEA. But this is not what the divorce decree does. The district court did not analyze its language, but it is in the record and shows that [the noncustodial father] retains some important rights, including the opportunity to be informed about and remain involved in the education of his son. If [the father and mother] disagree about educational decisions, then [the mother's] view prevails--unless under state law the school district's view prevails over either parent's wishes, and in that event [the father's] rights under the decree to influence the school's choices are even more important.

270 F.3d at 1149-1150 (internal citations omitted) (emphasis in original). Accordingly, the Seventh Circuit remanded the case to the district court, instructing it to "decide whether [the father's] claims [were] incompatible, *not* with the divorce decree itself, but with [the mother's] use of her rights under the decree." *Navin*, 270 F.3d at 1149-1150 (emphasis in original).

Navin's general approach to the problem of noncustodial parental standing is sound. We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights. This holding assumes, of course, that the noncustodial parent can establish an injury in fact that is fairly

traceable to the challenged action, and it is likely that the injury will be redressed by a favorable decision. See *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). Having already held that Newdow satisfies those Article III requirements, *see Newdow*, 292 F.3d at 603-05, we now turn to the question of whether he retains standing despite Banning's opposition as sole legal custodian to his maintaining this lawsuit.[1]

The February 6 custody order governing Banning's and Newdow's respective parental decision-making power remains operative and plainly does not strip Newdow of all of his parental rights. Rather, that order establishes that Newdow retains rights with respect to his daughter's education and general welfare. He has the right to consult with Banning regarding substantial non-emergency decisions (with Banning having ultimate decision-making power), as well as the right to inspect his daughter's school and medical records regardless of Banning's position.

California state courts have recognized that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict

[1] It is unclear to us exactly what relief Banning seeks. In her motion papers, at times Banning appears to object only to Newdow's appearance as "next friend" of their daughter. At other places, she also seems to object to Newdow's standing in his own right.

those of the custodial parent or offend her.[2] See *Murga v. Petersen*, 103 Cal. App. 3d 498 (1980). As the Murga court noted, it was following the "*majority of American jurisdictions*" in refusing to place restraints on a noncustodial parent who wished to expose his children to his particular religious views, absent a clear, affirmative showing that these religious activities would be harmful to the children. *Id.* at 504-05 (emphasis added). The principle of nonintervention, the court noted, "reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another." *Id.* at 505. It is not only the court that must not interfere; even more so, the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of *either* parent.

Murga was the basis for a later California state court decision, *In re Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983), that reversed a restraining order against a noncustodial father that forbade him from engaging his children in any religious activities other than those approved by the custodial mother. The *Mentry* court stated that "the concept of family privacy embodies not simply a policy of *minimum state intervention* but also a presumption of parental autonomy. Many of the purposes served by this presumption become *more important after dissolution* [of the marriage or relationship] than they were before." 142 Cal. App.

[2] As the Supreme Court has acknowledged, recognized religions exist that do not teach a belief in God, e.g., secular humanism." Torcaso v. Watkins, 367 U.S. 488, 495 n.11, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961).

3d at 268 (emphasis added). The type of "*minimum state intervention*" discussed in *Mentry* surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of either a custodial or noncustodial parent. We conclude that Newdow retains sufficient parental rights to support his standing here.

The next question, then, is whether Banning's status as sole legal custodian empowers her to employ state law to defeat Newdow's standing. "'Sole legal custody' means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." Cal. Fam. Code § 3006. Thus, Newdow cannot disrupt Banning's choice of schools for their daughter. And, as Judge Mize's September 25 order makes clear, Newdow cannot name his daughter as a party to a lawsuit against Banning's wishes.

Judge Mize, however, appropriately declined to rule on whether Newdow has standing in his own right as a parent to maintain this case in federal court. We hold that Banning has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be legally incompatible with any power Banning may hold pursuant to the custody order. Further, Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither Banning's personal opinion regarding the Constitution nor her state court award of legal custody is

determinative of Newdow's legal rights to protect *his own* interests.

When school teachers lead a recitation of the Pledge of Allegiance according to school district policy, they present a message by *the state* endorsing not just religion generally, but a monotheistic religion organized "under God." While Newdow cannot expect the entire community surrounding his daughter to participate in, let alone agree with, his choice of atheism and his daughter's exposure to his views, he can expect to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view. The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom. Just as the foundational principle of the Freedom of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, see *Cohen v. California*, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), so does the principle underlying the Establishment Clause protect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services. *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000); *Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992). Accordingly, we affirm Newdow's standing to challenge on Establishment Clause grounds the EGUSD's practice of requiring his daughter to attend daily recitations of the 1954 version of the

Pledge of Allegiance.

Banning's motion for leave to intervene is DENIED because she has no protectable interest at stake in this action.

FERNANDEZ, Circuit Judge, concurring:

I concur in the order, but write separately to emphasize that in this order we decide that Newdow's legal status under California law vis-a-vis his daughter does not deprive him of standing. Despite the order's allusions to the merits of the controversy, we decide nothing but that narrow standing issue.[1] Leastwise, I join nothing other than the narrow decision that the orders of the California courts have not deprived Newdow of standing.

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[1] For my view on the merits question, see Newdow v. U.S. Congress, 292 F.3d 597, 612-15 (9th Cir. 2002) (Fernandez, J., concurring and dissenting.)

Instruction AR 6115
Ceremonies and Observances

Patriotic Observances
Elementary Schools

Each elementary school class recite the pledge of allegiance to the flag once each day.

Secondary Schools

At some period during the day, a suitable patriotic observance shall be observed in every classroom. The observance for the day shall be uniform throughout the school and shall be selected by a committee appointed by the principal. Examples of suitable observances:

1. A pledge of allegiance to the flag.

2. The reading of a passage from one of our great American historical documents.

3. The reading of a quotation from one of our great American figures

4. Appropriate remarks commemorating an important event in our history.

5. Appropriate remarks along with the observance of the birthdate of great American historical figures.

Special Days and Events

Commemoration of special days and events shall be arranged to the end that the effective observation of these occasions is a definite and valuable part of the school program.

Declaration of holiday(s) may be made by the governing board when good reason exists. (Education Code 37222)

Legal Reference: Education Code
37220-37232 Saturdays and holidays
37227.6 Day of the Teacher
45203 Paid holidays
52720 Daily performance of patriotic exercises in public schools

Regulation approved: October 29, 1984

ELK GROVE UNIFIED SCHOOL DISTRICT

Elk Grove, California

37/237.1